CITATION: Lyn Hay Brockman v Cong Phuc Dinh [2004] NTMC 006

PARTIES:	LYN HAY BROCKMAN
	v
	CONG PHUC DINH
TITLE OF COURT:	LOCAL COURT
JURISDICTION:	CIVIL
FILE NO(s):	20214352
DELIVERED ON:	4 February 2004
DELIVERED AT:	DARWIN
HEARING DATE(s):	22 September 2003 – 25 September 2003
DECISION OF:	D TRIGG

CATCHWORDS:

Fixed term (5 years) lease/mango agreement; unconscionable conduct; special disadvantage; repudiation of lease/agreement; whether agreement mutually rescinded; calculation of damages; mitigation (duty and onus)

REPRESENTATION:

Counsel:

Plaintiff:	Mr O'Loughlin
Defendant:	Mr Cantrill

Solicitors:

Plaintiff:	Cridlands
Defendant:	T S Lee

Judgment category classification:	
Judgment ID number:	[2004] NTMC 006
Number of paragraphs:	188

IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20214352

BETWEEN:

LYN HAY BROCKMAN
Plaintiff

AND:

CONG PHUC DINH
Defendant

REASONS FOR DECISION

(Delivered 4 February 2004)

Mr D TRIGG SM:

1. This proceeding commenced on 17 September 2002. On that date the plaintiff filed Particulars of Claim. They were in the following terms:

> "1. The Plaintiff is the registered proprietor of an estate in fee simple in Sections 45 and 46 Hundred of Waterhouse Volume 67, Folios 38 and 39 respectively ("the Property").
>
> 2. A mango orchard is situated on the Property together with various fittings, fixtures, chattels and equipment associated with the operation of the mango orchard on the Property.
>
> 3. By an undated agreement entered into between the Plaintiff and Defendant ("the Agreement") the Plaintiff agreed to:
>
> (a) lease the Property and orchard to the Defendant together with fixtures and fittings and chattels detailed in the schedule attached to the Agreement;
>
> (b) lease the Property and orchard as set out above for a term of five years commencing 1 December 1999; and

(c) lease the Property and orchard as set out above at (a) on the terms and conditions set out in the Agreement therein.

4. Pursuant to the Agreement the Defendant:

(a) entered into occupation of the Property including the orchard, fixtures and fittings and chattels; and

(b) paid rental in the sum of $50,000 for the first two years of the term of the Agreement.

5. In breach of the Agreement the Defendant:

(a) refused and failed to pay rent in the sum of $10,000 due 30 January 2002;

(b) failed to install firebreaks on the property to the satisfaction of the Bushfires Council NT;

(c) failed to adopt good and proper horticultural and property management techniques in that the Defendant has:

(i) failed to install suitable fire breaks;

(ii) permitted branches of trees to be damaged by cherry pickers;

(iii) ringbarked the trees;

(iv) permitted the plantation to be infested with weeds;

(v) applied chemicals to the trees in a way which is detrimental to the long-term viability of the plantation;

(vi) failed to properly prune the trees.

(d) told the Plaintiff that he would not pay the rent and that the Plaintiff would need to take the Defendant to court to get the outstanding rent;

(e) vacated the Property and orchard;

(f) failed to maintain the Property in a clean and tidy and sanitary condition;

(g) failed to make good damage to the orchard and Property;

(h) failed to cultivate the land in a good and proper manner for the purpose of agricultural pursuits; and

(i) failed to maintain and keep preserved all of the mango trees situated on the Property.

6. The said breaches of the Agreement by the Defendant evidenced an intention to no longer be bound by the terms of the Agreement and constituted a repudiation by the Defendant of his obligations pursuant to the Agreement.

7. By letter from Cridlands to the Defendant dated 7 May 2002 the Plaintiff accepted the said repudiation by the Defendant of the Agreement as the Plaintiff was entitled to do.

8. As a result of the Defendant's said repudiation the Plaintiff has lost the benefit of the Agreement and lost the revenue she would otherwise have received thereunder and has suffered loss and damage.

PARTICULARS

(a) The Plaintiff claims the sum of $75,000 being rental for the residue of the term of the Agreement from 30 January 2002 to 30 November 2004.

9. The Plaintiff was at all times the owner of a John Berends six foot offset slasher ("the Slasher") which was included in the chattels listed in the schedule attached to the Agreement.

10. Without the consent of the Plaintiff, the Defendant has removed the Slasher from the Property and refused to return it to the Plaintiff.

11. On acceptance by the Plaintiff of the repudiation of the Agreement by the Defendant, the Defendant was obliged to return the Slasher to the Plaintiff.

12. The Defendant is and has been since some date prior to 7 May 2002 wrongfully in possession of the Slasher.

13. By letter from Cridlands to the Defendant dated 7 May 2002 the Plaintiff demanded return of the Slasher from the Defendant, but the Defendant has wrongfully failed and refused to deliver it up to the Plaintiff and has thereby

converted the same to his own use and wrongfully deprived the Plaintiff thereof.

14. By reason of the matters pleaded at paragraph 13 herein the Plaintiff has suffered loss and damage.

PARTICULARS

(a) Value of the Slasher $4,200.00

AND THE PLAINTIFF CLAIMS.

(a) the sum of $75,000.00 for arrears of rental under the Agreement;

(b) damages for conversion by the Defendant of the Slasher in the sum of $4,200.00; and

(c) costs."

2. On 23 December 2002 the defendant filed a Defence and Counterclaim in the following terms:

"1. The defendant admits Paragraphs 1 and 2 of the Statement of Claim.

2. As to Paragraph 3 save as is set forth hereunder the defendant denies the matters alleged and each of them.

(a) The defendant says that he is a person who generally understands spoken English but has little understanding of written English. He says that he entered into an agreement with the plaintiff on or about 8 November 1999 but says that he did not understand that this agreement was intended by the plaintiff to constitute a lease as alleged.

(b) The defendant attended at the home of the plaintiff on or about the date referred to above, and discussed with the plaintiff the possibility of entering into a "mango agreement" to purchase and pick the mango crop growing on the Property during the year 2000 and subsequently for a maximum of 5 years. The plaintiff after discussion as to terms produced a document which the defendant believed to be a mango agreement. The plaintiff required his signature forthwith, and he was not

given an opportunity to seek independent legal advice relating to the document.

(c) The defendant believed and understood from what he had been told by the plaintiff that his obligations pursuant to the agreement were to care for the plaintiffs mango trees including slashing, constructing a firebreak, and servicing and installing an irrigation system. He would then be entitled to harvest and sell the mango crop for which he was to pay the plaintiff agreed sums.

(d) The defendant on entering into what he believed and understood to be the agreement paid to the plaintiff a sum $10,000 at the plaintiff's request as part payment under the agreement.

3. As to Paragraph 4 the defendant denies that be entered into occupation of the Property as alleged or at all. He admits that following the signing of the document as referred to above he did from time to time enter the Property for the purpose of performing what he understood to be his obligations and tasks pursuant to the agreement, and for the purpose of harvesting the mango crop thereon. He says that the only "fixture, fitting and /or chattel" on the Property apart from the mango trees and an unoperational irrigation system was a structure which consisted of a roof supported by posts but without walls. The Property was fenced but the gates were unlocked and he was given no keys, nor did he receive exclusive possession. He admits that he paid the plaintiff the sum of $50,000 pursuant to what he understood to be his obligations under the mango agreement.

4. As to Paragraph *5* the defendant denies that he breached the agreement as alleged or at all.

(a) He says that following the 2000 mango season he said to the plaintiff words to the effect that he was making no profit and could no continue. The plaintiff however said to the defendant words to the effect, "No worries, I will look after you", and wrote something on her copy of the agreement. The defendant was persuaded to continue slashing the grass and otherwise maintaining the mango trees and to harvest the 2001 crop.

(b) On or about 4 October 2001 the defendant again said to the plaintiff words to the effect that he could not continue with the agreement as he was losing money.

After discussion the plaintiff asked the defendant to try and find someone who could take over the maintenance, care, and harvesting of the mango crop.

(c) The defendant agreed to try and find some person to take over as alleged. He enquired of a number of people none of whom was prepared to take on the work under the terms and conditions sought by the plaintiff.

(d) In about December 2001 the plaintiff telephoned the defendant and asked whether he had found someone else. He told her be had not, and said again that he no longer wanted mangos from her. After some discussion the plaintiff agreed that she would try and find someone to take over the mango agreement. The defendant says that the effect of this discussion was that the entire contract been him and the plaintiff was discharged by mutual consent, in consideration that each would release the other from any further obligations pursuant to the contract.

(e) Thereafter the defendant acting pursuant to his understanding of the agreement did not return to the Property and performed no further functions relating to the care and maintenance of the mango trees or their crop. The plaintiff for her part arranged for other persons to maintain the properly and to harvest the 2002 crop.

(f) The defendant agrees that he did not pay rent due on 30 January 2002. He denies that this was in breach of any agreement as alleged or at all and says that this was because his agreement with the plaintiff had been discharged as more fully described above. He says further that by consent of the plaintiff he had not paid the $10,000 due in January 2001 until October 1992 because the plaintiff was aware he was unable to meet his financial obligations pursuant to the lease.

(g) The defendant denies that at any time during the continuation of the agreement he failed to install firebreaks on the property to the satisfaction of the Bushfires Council NT.

(h) The defendant denies that at any time during the continuation of the agreement he failed to adopt good and proper horticultural and property management techniques as alleged or at all.

(i) The defendant admits he told the plaintiff that he could not pay the rent but denies that he told the plaintiff she would need to take him to court as alleged: he says that in fact, the plaintiff before agreeing to the discharge of the agreement had threatened to take the defendant to court.

(j) The defendant denies that he ever had exclusive possession of the Property and orchard and therefore could not vacate it. He admits he did not return to the property after discharge of the agreement in about December 2001.

(k) The defendant denies that at any time during the continuation of the agreement he failed to maintain the Property in a clean and tidy condition. He does not understand that to which the plaintiff refers regarding any sanitary condition as no toilet or sanitation facilities existed on the Property.

(l) The defendant denies that at any time during the continuation of the agreement he failed to make good damage to the orchard and Property as alleged or at all. He says that during the 2000/2001 mango seasons the plaintiff complained that the trees were being damaged by use of a cherry picker to harvest the crop, but she made no further complaint after the plaintiff pointed out it was impossible to harvest with a cherry picker, without some damage and that any damage was minor only and did not affect the ability of the trees to produce mangoes.

(m) The defendant denies that at any time during the continuation of the agreement he failed to cultivate the land in a good and proper manner for the purpose of agricultural pursuits.

(n) The defendant denies that at any time during the continuation of the agreement he failed to maintain and keep preserved all of the mango frees situated on the Property.

(o) Further as to clauses (b) to (i) of Paragraph 5 of the Statement of Claim herein the defendant says that to the best of his understanding of his agreement with the plaintiff he was required only to care for the plaintiffs mango trees including slashing grass, pruning, spraying,

fertilising, constructing a firebreak, and servicing and installing an irrigation system.

5. As to Paragraph 6 the defendant denies that he was in breach of any agreement between him and the plaintiff and denies that any alleged breach constituted a repudiation by him of his agreement with the plaintiff by reason of the prior discharge of such agreement as did exist by mutual consent of the parties for valuable consideration, as more fully set forth above.

6. As to Paragraph 7 the defendant does not admit that a letter was sent to him by Cridlands as alleged or at all and says that any such letter as was sent could not constitute an acceptance of any repudiation because the contract had already been validly discharged.

7. As to Paragraph 8 the defendant denies any repudiation as alleged or at all and denies further that the plaintiff has lost the benefit of their agreement. The defendant says further that if, which is denied, the plaintiff has suffered loss as the result of any default on his part, the plaintiff has failed to mitigate her alleged loss, or alternatively has failed to deduct from the amount of her claim any sum received or to be received by her in mitigation of any alleged loss.

8. As to Paragraph 9 the defendant admits that the plaintiff owned a slasher but does not know and cannot admit what brand it may have been nor whether it was included in "the chattels listed in the schedule attached to the Agreement" as alleged. He further does not know and cannot admit that there was any such schedule attached as alleged or at all.

9. As to Paragraph 10 the defendant denies that he has removed a slasher from the Property as alleged or at all. He says that the plaintiff had a slasher on another property which, at the plaintiffs request, he removed, renovated and repaired to bring it back to an operable condition. After renovation and repair he used it on the Property and has retained it at his premises for safe-keeping, as the Property is unoccupied and has no lock-up facilities to secure it. The plaintiff has been well aware since discharge of the contract that she could at any reasonable time arrange to collect the slasher from the defendant.

10. As to Paragraph 11 the defendant denies his agreement with the plaintiff was repudiated and further denies the plaintiff accepted any repudiation as alleged or at all. He further denies that the document relied upon by the plaintiff contains any

provision requiring the return of the slasher. The defendant says that nonetheless he is prepared to waive any lien he may have for the monies and labour expended by him in repairing the machine provided the plaintiff arranges at her own expense to collect the said machine.

11. As to Paragraph 12 the defendant denies that he has either since the date alleged or at all been wrongfully in possession of the slasher.

12. As to Paragraph 11 the defendant admits that at some date he received a letter bearing date 7 May 2002 from Cridlands. He cannot now remember when he received the letter but says that he has not had it translated. As best as be can understand it, however, he says that the plaintiff through her solicitors made no offer to reimburse the defendant for the money and time expended by him on effecting renovations and repairs to the slasher. He denies that be has wrongfully failed and refused to deliver it up to the plaintiff and denies that he has converted it to his own use and/or wrongfully deprived the plaintiff thereof.

13. As to Paragraph 14 the defendant denies that the plaintiff has suffered loss and damage as alleged or at all.

14. And for a further defence the defendant says that the actions of the plaintiff as set forth herein constitute unconscionable conduct within the meaning of the unwritten Law of Australia and the defendant asks that the transaction be set aside and the claim of the plaintiff dismissed.

15. And for a further defence by way of set-off the defendant relies upon the matter pleaded in the counterclaim hereunder.

COUNTERCLAIM

THE DEFENDANT CLAIMS a declaration that any contract found to exist between the plaintiff and the defendant is in all the circumstances unconscionable and seeks a further order that any such contact be set aside and the plaintiff refund to the defendant the sum of $50,000 paid by him pursuant to the purported contract and pay a further sum of $50,000 by way of damages for compensation for his time, labour and effort in attempting to comply with what he understood to be the terms of the purported contract between himself and the plaintiff

PARTICULARS OF CLAIM

16. At all relevant times the plaintiff was a supplier and the defendant was a customer within the meaning of the unwritten Laws of Australia

17. The defendant repeats Paragraph 2 of his Defence herein as if the same were fully set forth in this paragraph.

18. The defendant says that the actions of the plaintiff in requiring him to sign a document without giving him the opportunity of obtaining independent legal advice; in failing to ensure that he was able to understand the contents and legal effect of the document she required him to sign; in failing to inform him that the document she required him to sign purported to be a lease and not a mango contact; in failing to have regard to the foreseeable fact that the terms of the agreement imposed or sought to be imposed by her were so onerous as not to permit the defendant to make any profit out of the harvesting of the plaintiff's mangoes; in endeavouring to require him not to use a cherry picker to harvest the mangoes; and in purporting by the claim herein to insist on performance of her version of the purported contract knowing well that any agreement between them did not constitute a lease of land; and in failing to make any allowance or deduction of her claim for proper mitigation of any such contract as may be found to exist constitute unconscionable conduct within the meaning of the unwritten Law .

19. As a result of the conduct of the plaintiff the defendant has paid to the plaintiff a total of $50,000.00 in respect of what he understood the agreement to be, and has expended by himself and with the assistance of his family a further amount of time, labour, and effort over a period of two years in attempting to maintain, keep clean, improve and repair the plaintiffs orchard and machinery whereby the plaintiff has been unjustly enriched, and the defendant says that the value of such work exceeds the sum of $50,000.00 but that he is prepared in the circumstances to waive any amount by which this counterclaim would otherwise exceed the jurisdictional limit of this Honourable Court."

3. On 4 March 2003 the plaintiff filed a Reply to the Defence and a Defence to the Counterclaim as follows:

"1. As to paragraph 2(a) of the Defence the Plaintiff:

(a) does not admit that the Defendant has little understanding of written English;

(b) admits the Defendant entered into an Agreement with the Plaintiff on or about 8 November 1999;

(c) denies that the Defendant did not understand that the Agreement was a lease; and

(d) will rely on a proper interpretation of the Agreement for its full force and effect.

2. As to paragraph 2(b) of the Defence the Plaintiff:

(a) admits the Defendant attended at the Plaintiff's home on or about 8 November;

(b) otherwise denes the allegations contained therein; and

(c) says that she had met with the Defendant before 8 November 1999 at which time there had been a discussion concerning the defendant entering into a lease of her property and operating her mango orchard.

3. The Plaintiff denies the allegations contained in paragraph 2(c) of the Defence.

4. The Plaintiff denies the allegations contained in paragraph 2(d) of the Defence save and except that the Defendant paid $10,000.00 at the signing of the Agreement on or about 8 November 1999 which constituted the first rental payment in accordance with the terms of the Agreement set out therein.

5. In relation to paragraph 3 of the Defence the Plaintiff:

(a) denies the allegations contained therein as if the same were set out herein and denied seriatim; and

(b) refers to and relies on the "Schedule of Goods and Chattels" incorporated to the Agreement entitled "Memorandum of Lease."

6. In relation to paragraph 4(a) of the Defence the Plaintiff:

(a) denies that the conversation pleaded took place as alleged or at all;

(b) says that following the end of the 2000 mango season, the Defendant negotiated with the Plaintiff to defer the due date for rental payments in the second term of the Agreement and to reduce the rental payments for the second, third, fourth and fifth terms of the Agreement.

Particulars

(i) On or about January 2001 at the commencement of the second term of the Agreement and when the first instalment of rental payments for that year fell due the Defendant told the Plaintiff that he could not pay at that time and asked the Plaintiff if he could defer payment to September 2001 when the balance of rental for the second term fell due.

(ii) Further, during the course of this discussion the Defendant asked the Plaintiff to reduce the rental payments due in the third, fourth and fifth term of the Agreement.

(iii) The Plaintiff consented to the deferral in payment for the second year term and to the reduction in rent for the third, fourth and fifth year terms as pleaded above because the Defendant told her that extra work was required to slash the grass and prune the trees.

(iv) The Defendant paid the second term rental in September 2001.

(v) Notwithstanding that the Agreement was varied to reduce the rent in the third, fourth and fifth terms, the Defendant did not prune the trees or slash the grass during the second term of the lease as alleged or at all.

(c) otherwise denies the allegations contained therein.

7. In relation to paragraph 4(b) of the Defence the Plaintiff:

(a) admits the Defendant told the Plaintiff words to the effect that he did not want to be bound by the terms of the Agreement;

(b) says she told the Defendant that they had an agreement and that he would need to find someone else to honour

the Agreement if he was not prepared to do continue with it; and

(c) otherwise denies the allegations as contained therein.

8. In relation to paragraph 4(c) of the Defence the Plaintiff repeats paragraph 7 above but otherwise does not admit the allegations contained therein.

9. In relation to paragraph 4(d) of the Defence the Plaintiff:

(a) denies that the conversation pleaded took place as alleged or at all; and

(b) otherwise denies the allegations contained therein in their entirety.

10. In relation to paragraph 4(e) of the Defence the Plaintiff denies that she arranged for other persons to maintain the property and to harvest the crop as alleged but otherwise does not plead to paragraph 4(e) of the Defence as no allegations are contained in that paragraph.

11. In relation to paragraph 4(f) of the Defence the Plaintiff:

(a) denies the Agreement was discharged as alleged or at all; and

(b) repeats paragraph 6 herein.

12. In relation to paragraphs 4(g)-(n) inclusive of the Defence the Plaintiff:

(a) denies the allegations pleaded therein as if the same were set out herein and denied seriatim;

(b) says, in relation to the allegations contained in paragraph (k) that items described as “enclosed septic toilet and wash facility” are included in the “Schedule of Goods and Chattels” incorporated to the Agreement and further that it was a term of the Agreement at clause 3 that the Defendant would “maintain the property at all times in a clean, tidy and sanitary condition;” and

(c) says, in relation to the allegations contained in paragraph (1) that notwithstanding that she expressed her concern to the Defendant in respect of him using a cherry picker

to pick the fruit, the Defendant continued to do so without her consent.

13. The Plaintiff does not plead to paragraph 4(o) of the Defence as no allegations are contained in that paragraph.

14. The Plaintiff denies the allegations contained in paragraphs 5 and 6 of the Defence.

15. In relation to paragraph 7 of the Defence the Plaintiff:

    (a) says any monies paid by the Defendant to the Plaintiff constituted rental payments in return for the lease of the property and orchard pursuant to the Agreement;

    (b) otherwise denies the allegations contained therein.

16. In relation to paragraph 8 of the Defence the Plaintiff denies the allegations contained therein and says further that on 8 November 1999 the Defendant left the Plaintiff's house with a signed copy of the Agreement entitled "Memorandum of Lease" which incorporates the "Schedule of Goods and Chattels" which includes an item described as "1 x John Berends Six Foot Offset Slasher."

17. In relation to paragraphs 9 of the Defence the Plaintiff:

    (a) repeats paragraph 12 of the Statement of Claim; and

    (b) otherwise denies the allegations contained therein as if the same were set out herein and denied seriatim.

18. In relation to paragraph 10 of the Defence the Plaintiff:

    (a) denies the Defendant is entitled to any lien over the slasher as alleged or at all nor to any monies for the repairs alleged to have been carried out or at all;

    (b) otherwise does not plead to the matters contained therein as there are no allegations contained within that paragraph.

19. In relation to paragraph 12 of the Defence the Plaintiff repeats paragraph 18 above and otherwise denies the allegations contained therein.

20. In relation to paragraph 14 of the Defence the Plaintiff:

(a) denies the allegations contained therein;

(b) denies the Defendant is entitled to the relief sought or to any relief at all;

(c) denies section 43 of the *Consumer Affairs and Fair Trading Act* has application to the matters the subject of these proceedings and will rely on a proper interpretation of the Act for its full force and effect.

21. In relation to paragraph 15 of the Defence the Plaintiff denies the Defendant is entitled to the set-off as alleged or at all.

DEFENCE TO COUNTERCLAIM

22. In relation to the first paragraph of the Counterclaim, the Plaintiff denies the Defendant's entitlement to the declaration and orders as alleged or at all.

23. The Plaintiff denies the allegation contained in paragraph 16 of the Counterclaim.

24. The Plaintiff denies the allegations contained in paragraph 18 of the Counterclaim as if the same were set out herein and denied seriatim.

25. In relation to paragraph 19 of the Counterclaim the Plaintiff:

(a) says that the payment of $50,000.00 by the Defendant to the Plaintiff constituted rental payments for the lease of the Plaintiff's property and orchard by the Defendant for the first and second terms of the Agreement in 2000 and 2001;

(b) says the Defendant in breach of the Agreement, sublet the property and orchard to other persons without the prior approval and consent of the Plaintiff; and

(c) otherwise denies the allegations contained therein as if the same were set out herein and denied seriatim."

4. It was on these pleadings that issue was joined between the parties.

5. The plaintiff is aged about 59 years. She is a self-employed child carer who operates a business from her home in Moil. Prior to this she was a public servant.

6. In 1982 the plaintiff and her then husband purchased two blocks of land at 595 and 605 Miles Road Eva Valley. Mango trees were planted on the said blocks in about 1982. By the relevant period herein there were approximately 1000 mango trees on the properties, but not all of these were of the same type or age. Of the trees approximately 550 were of the Kensington Pride variety. The evidence did not enable me to conclude what type of mango was on the remaining trees.

7. The plaintiff and her former husband divorced in 1989 and as a result of the property settlement the plaintiff then became the sole owner of the two blocks herein. The trees were still quite small by this stage and from 1990 the plaintiff looked after the trees herself. It is not clear on the evidence as to what this entailed.

8. It is clear from the evidence that the plaintiff was not particularly knowledgable on the topic of mangoes or mango trees. She did not hold herself out as an expert. The trees did not start producing fruit until about 1993 or 1994. Initially only small amounts of fruit were produced. The plaintiff appears to have obtained pickers to pick the fruit in the early years. There was no evidence to suggest that the plaintiff pruned any of the trees prior to 1997.

9. In about 1997 the plaintiff entered into a lease with persons by the name of Wilson. This lease was for a three year period and was to effectively lease the crop to the Wilsons for that period. The Wilsons were to have some responsibilities in relation to caring for the trees and in return for the payment of an annual fee they had the right to harvest the mangoes and retain any monies therefrom. The agreement was not tendered in evidence before me. However, the plaintiff said in her evidence that the agreement was prepared by the Wilson's and presented to her, and when she entered into an agreement with the defendant herein she used the same document but changed the names.

10. The Wilson's apparently paid $30,000 a year to the plaintiff for the lease.

11. From the evidence it appears (and I find) that the plaintiff was not overly interested in the two blocks and her only interest appeared to be to make some money out of them. During the time that the Wilsons had the lease over the blocks, and indeed when the defendant had his lease, it appears that the plaintiff attended the blocks very rarely. On all the evidence I am not able to find she attended the blocks any more than maybe once a year and there may have been years when she did not attend at all. There is no evidence to suggest that the plaintiff was aware of any problem with her trees (and in particular the size of her trees) at any time prior to her entering into the relevant agreement (to which I will turn shortly) with the defendant.

12. Given her lack of attendance at the blocks I am unable to accept her evidence that the Wilsons cared for the trees properly or that the trees were properly pruned or pruned at all during the time that the Wilson's had a lease. Her evidence in this regard is inconsistent with all the other evidence in the case as to the state of the mango trees in the period 1999 to 2002. There is nothing to suggest that the Wilsons were not available to give evidence. The plaintiff said that she last saw Mrs Wilson not that long ago when she dropped in to drop off a statement.

13. In his written submission (page 8) Mr Cantrill seeks that I draw an inference due to the failure to call the Wilson's. I do not consider this to be necessary. The only direct evidence as to the state of the trees at or about the time the lease was entered into comes from the defendant. Accordingly, it is sufficient if his evidence is accepted as unchallenged in this regard. It is unnecessary to go further.

14. On the evidence I am therefore unable to find on the balance of probabilities that the Wilsons cared for or properly maintained the blocks during the period of their lease. Nor am I able to be satisfied on the balance of probabilities that they ever pruned the mango trees in question, or if they did that they ever did so properly or adequately. Given that the Wilson's were not called, and are not parties to this dispute no findings herein are

able to be used against them. The plaintiff agreed in her evidence that the trees needed to be pruned back every year, and more pruning was involved as the trees got older.

15. After the three year lease to the Wilsons had been completed the plaintiff rang a friend to obtain a list of people who might be interested in taking over the mango trees. I am unable to find from the evidence as to why the Wilsons were not interested in continuing with a further lease. One of the people on the list was the defendant.

16. The defendant was born in Vietnam in 1959. He is married to Lieu Thi Le and together they have three children. The defendant came to Australia about thirteen years ago originally settling in Brisbane. He did about one month of English classes in Brisbane.

17. When the defendant resided in Brisbane he rented a house. He understood that if you rent something you pay a landlord and you obtain the use of a piece of land.

18. After arriving in Australia the defendant initially worked on a farm. He also worked for four months in a restaurant. He also was involved in buying and selling mud crabs but not in the catching of them. In about 1997 he first became involved with mangoes. He was initially working and packing but then in about 1999 he entered into an agreement with Joe Webber for one year. He talked to his lawyer T.S Lee and Mr Lee did the agreement in relation to the Webber property. The defendant ended up buying the mangoes from the Webber property for a two-year period.

19. By the end of the June 1999 income tax year the defendant had built up a quite sizeable business and his main business activity was described in his taxation return for that year as “mango and vegetable and crabs wholesaler”. His income tax return for the financial year ended 30 June 1999 (ExD9) discloses his gross income as $948,263.00 with a net profit of $80,769.00.

His income tax return for the year ended 30 June 2000 (ExD9) shows his gross income to have been $1,395,656 and his nett profit as $97,216.

20. The way that the defence and counterclaim is pleaded and the way that the evidence was led from the defendant was clearly aimed at suggesting the defendant was a somewhat naive Vietnamese man with limited English skills and limited English reading skills. Whilst I accept that the defendant is not fully conversant in English and would have difficulty understanding some words and concepts, he was a businessman. He understood money. He was in the business (amongst other things) of growing and selling mangoes both from his own property and other people's as well. He was not dealing in a small way, and was continually looking to expand his mango operations.

21. It was only in cross-examination that the true size of the defendant's mango business and operation started to become apparent. Even then the defendant was not honest and fulsome in relation to his mango operations. The defendant initially said that he only had three written mango agreements ever, one with the plaintiff and two with Joe Webber. This evidence turned out to be untrue.

22. On the evidence I find on the balance of probabilities that during the relevant periods the defendant had been involved in at least the following mango agreements. He may have had considerably more which he has not told the court about:

- In about 1999 and 2000 an agreement with Joe Webber to look after the trees, fertilise, pick and pack and sell mangos. For this the defendant paid $40,000 and another $40,000 when picking.

- For about three years from 1999 to about 2001 the defendant paid $120,000 a year to go and pick and sell the mangos of Peter Cavenagh.

- In about 2000 or 2001 a one year agreement (in writing) with Bill at Fogg Dam for which he paid $50,000. The agreement was prepared by Bill's

lawyer, and because it was only for one year the defendant was happy to sign it without getting his lawyer T S Lee to look at it.

- A two year agreement with Quail farm (allegedly not in writing) for which the defendant paid $150,000 the first year and $175,000 for the second year.

- A lot of small farms where he paid around about $10,000. There was too many of these to remember and all he could say was that there were "a lot".

- In addition the defendant owned his own properties (two) and produced and sold mangos as well.

- The defendant entered into a written agreement with Christine Marshall, Marko Simlesa and Maya Simlesa on 4 November 2000 (ExP14) to pay $25,000 for the 2001 year crop. The defendant's obligation under this agreement was to "prune, pray, fertilise, pick, pack and market mangos and other work associated with care of mango trees including clearing the ground of prunings and to check that irrigation sprinklers are working".

- On 10 October 1998 the defendant entered into a written Orchard Management and Harvesting Agreement with Erich Rheinlander (ExP15) for a period of three years for a payment of $6,000 per annum. The defendants obligation was that "in exchange for the fruit on the tree will manage the orchard for a period of three years".

23. Neither of the documents forming ExP14 or ExP15 were discovered by the defendant, but these were somehow obtained by the plaintiff. Although the defendant was given every opportunity to advise the court of the written agreements that he had he did not disclose or even concede the likely existence of ExP14 or ExP15. It was not the case that the defendant was simply unsure as to what he might have, rather I find that he was unwilling to concede the truth unless he was compelled to. I am unable to accept the

defendant as a fulsome and truthful witness in all regards. He may well have had other agreements that the Court has not been advised of.

24. Despite the fact that the defendant was claiming the return of the money he had already paid to the plaintiff in his defence and $50,000 in damages not one financial document was discovered by the defendant in his list of documents. I find this to be without any reasonable explanation. The defendant only started producing financial documents and records towards the end of day two of the trial, and I find that this was only done reluctantly in order to try and prove or establish a counter-claim. Mr O'Loughlin (counsel for the plaintiff) accepted the "drip feed" of financial documents without objection in order to ensure that the hearing did not go off part heard. In my view, the plaintiff would have been entitled to seek an adjournment with costs if she had wished to. Rather, it was the defendant who tried to delay the hearing by seeking an adjournment on the basis of his own non-discovery of documents.

25. Given the nature of the defence (unconscionable) the defendant's level of understanding and business acumen in relation to mango agreements / leases in general was clearly a relevant and material matter. The failure by the defendant in his list of documents to discover any written mango agreement whatsoever (apart from the one involving the plaintiff) or any financial documents whatsoever to establish any alleged loss defies any reasonable explanation.

26. I find on the evidence that by October 1999 the defendant was seriously and actively involved in entering agreements with the owners of mango trees in relation to the management, picking and selling of mangoes. Further, he was involved in a number of agreements and was actively seeking more. A number of these agreements were oral, but a number were also in writing. Some of these agreements had been prepared by his solicitor Mr Lee, and others prepared by the other parties solicitors. In those circumstances, if the

defendant felt unsure about the meaning of a particular agreement he had Mr Lee available to provide advice if required.

27. I return to the chronology of events in this case. In about October 1999 the defendant was working on Joe Webber's property, which was next door to the plaintiff's property. A man he knew (Thep) was working on picking the mangoes on the plaintiff's property (presumably as arranged by the Wilsons). The defendant went over to the plaintiff's farm and spoke to Thep. He asked how many mangos he had taken off and was advised forty of fifty tonne, but that the picking had not yet finished. The defendant had a general look at the trees and also a look at the fruit, which looked "OK" to him. In relation to the trees he noted that they were high and it looked to him that no-one had been pruning them before. He was aware that it would cost more to pick mangoes because of the height of the trees. He was with Thep for a maximum of about forty-five minutes on this occasion.

28. There was evidence before me that there might be some problems with the fruit because of the size of the trees and the limited sunlight access to the fruit. However, the defendant did not agree with this. It was his evidence that you prune to make the tree tidy so the sun can come in. He went on to say that in his experience pruning the tree may not effect blackspot. He said every tree over one year old had it and pruning may or may not help. He said the main reason was the weather and in particular fog. He said that he saw fog on the plaintiff's farm.

29. It may well be the case that the defendant did not fully comprehend the cost and problems that the size of the trees would create. However, he was in the business (and not in a small way) of leasing mango trees and should have known or made it his business to find out. Further, it later came out in cross-examination that the defendant wasn't surprised by the size of the trees as he had "big trees like that on my farm". He therefore should have been fully aware of any potential problem that might be created by such large trees.

30. Not long after the defendant had visited the plaintiff's blocks she rang the defendant to see if he was interested in picking and buying her mangoes. The defendant was aware of the property in question as a result of this earlier visit a short time before and was familiar with the trees on the property. He was fully aware of their size.

31. The defendant was generally interested in buying mangoes when and where he could. On his evidence, when driving around he would even stop and go onto properties to see if he could buy the mangoes on the properties.

32. Accordingly, when the plaintiff rang the defendant the defendant advised her that he was interested in buying the mangoes and also advised her that he was aware of the property. The defendant asked how much money the plaintiff wanted. In his evidence the defendant says that he was told $25,000 for the first year and $30,000 for the next four years.

33. There is no evidence to suggest that there was any problem with the quality of the mangoes prior to 2000, or that the plaintiff had any knowledge that there might be. She expressly denied both suggestions. I find that the plaintiff was not aware of any problem with her trees or fruit when she was negotiating with the defendant.

34. The plaintiff in her evidence said that after the initial conversation over the telephone the defendant attended upon her personally a few days later at her house and it was in this conversation that more details were discussed. The plaintiff said when the defendant asked how much she wanted she told him that the last lease she had was for $30,000 a year. She told him that he had to prune the trees back and put fire-breaks in according to the Bushfire Council requirements. She said that the defendant said he knew as he had been doing mangoes for a number of years. She went on to say that the defendant said that to prune the trees back he would need a reduction as it would be fairly costly to prune the trees. After some discussion the plaintiff said it was agreed that the price would be $25,000 for the first two years and $30,000 for the remaining three years. The defendant agreed and it was

further agreed that there would be a written lease which the plaintiff would arrange.

35. I prefer the evidence of the plaintiff to the defendant in relation to how discussions took place.

36. In relation to the contact between the parties the plaintiff was asked in cross-examination whether the defendant had an accent and she replied "a little". She went on to say that he had no problem pronouncing words and thought he could speak clearly. My observations of the defendant in the witness box differ from this. He had a strong accent, and at times I found him a little hard to understand. He used an interpreter at times during his evidence but at other times was comfortable enough not to.

37. It is not asserted by the defendant that the plaintiff made any representations at any time as to the size of the trees, the quality of the fruit, or the access to picking the fruit. I find that the plaintiff did not make any representations to the defendant that in any way impacted on his subsequent decision to enter into the agreement that he did.

38. The plaintiff went on to say that she suggested to the defendant that upon signing an agreement $10,000 would be payable with payments thereafter on the 30th of January and the 15th of September each years. She said that this was agreeable to the defendant. On the plaintiff's evidence the defendant then went away and she prepared the agreement and the defendant re-attended some days later and signed the agreement.

39. The agreement (which became ExP8) was as follows:

> " <u>MEMORANDUM OF LEASE</u>
>
> (Lessor) LIN HAY (HAZEL) BROCKMAN of 44 Lanyon Terrace, Moil in the Northern Territory of Australia ("the Lessor")
>
> (Land) being registered or entitled to be registered as the proprietor of an estate in fee simple in Section 45

Hundred of Waterhouse Volume 067 Folio 038 and Section 46 Hundred of Waterhouse Volume 067 Folio 039 and hereinafter referred to as Lot 45 and Lot 46 Miles Road, Eva Valley, Batchelor.

(Lessee) DO HEREBY LEASE to (PAUL) PHUC CONG DENH (the Lessee)

(Premises) all the land aforementioned at Lot 45 and Lot 46 Miles Road, Eva Valley, Batchelor together with all fixtures and fittings, chattels, effects and machinery therein or thereon as detailed on the attached schedule.

(Term) FOR A TERM of Five (5) years commencing on the First Day of December 1999 and terminating on the Thirtieth Day of November 2004 at Midnight (the Term)

(Rent) To the following terms:

At signing of Contract	(1st year of Term)	$10,000.00
15th September 2000	(1st year of Term)	$15,000.00
30th January 2001	(2nd year of Term)	$10,000.00
15th September 2001	(2nd year of Term)	$15,000.00
30th January 2002	(3rd year of Term)	$10,000.00
15th September 2002	(3rd year of Term)	$20,000.00
30th January 2003	(4th year of Term)	$10,000.00
15th September 2003	(4th year of Term)	$20,000.00
30th January 2004	(5th year of Tem)	$ 10,000.00
15th September 2004	(5th year of Term)	$ 20,000.00

SUBJECT TO THE FOLLOWING TERMS AND CONDITIONS:

1. To pay the rent on time unless agreed by the Lessor to alter payment schedule.

2. Not to sublet any part of the land without the prior approval of the Lessor.

3. To maintain the property at all times in a clean, tidy and sanitary condition.

4. To allow reasonable access to the property by the Lessor by prior arrangement.

5. The Lessee shall remove any fixtures and fittings installed by them and make good any damage which may occur during such removal.

6. It is the responsibility of the Lessor to maintain Insurance Coverage against damage or destruction of the property and fixtures, fittings, chattels, effects and machinery owned or stored by the lessor on the property.

7. The Lessee shall make good any damage caused by them during the time they occupy the property.

8. If the premises as aforementioned are rendered wholly or partially unfit for occupation or use then the rent or a fair and just proportion of it shall be suspended and cease to be payable so long as the premises are wholly or partially unfit for use or occupation by reason of such damage.

9. The Lessee shall not allow the property to be used for illegal purposes and will cultivate the land in a good and proper manner for the purpose of agricu1tural pursuits and shall maintain and keep preserved to the best of their ability all mango trees therein, and take all precautions to prevent an outbreak of fire on the property and to safeguard all mango trees against any such outbreak.

10. All local municipal rates and taxes imposed on the properties are the responsibility of the Lessor.

SIGNED by the said

LIN HAY BROCKMAN
in the presence of

Signed by the said
(PAUL) PHUC CONG DINH
in the presence of

SCHEDULE OF GOODS AND CHATTELS

PERIMETER FENCING (in need of repair in quite a few places)

I x JOHN BERENDS SIX FOOT OFFSET SLASHER.

OPEN SHED WITH TREATED TIMBER PINE UPRIGHTS AND CUSTOM ORB ROOF.

ENCLOSED SEPTIC TOILET AND WASH FACILITY.

LISTER DIESEL 2 CYLINDER MOTOR AND SOUTHERN CROSS PUMP TO BORE.

IRRIGATION TO APPROXIMATELY FIVE HUNDRED AND FIFTY MANGO TREES.

CARAVAN (no windows, floor or cupboards)".

40. As noted, on the defendant's version, there was only one attendance in person and the agreement was produced and signed on this occasion. Although not much turns on this aspect I reject the defendant's evidence in this regard and prefer the evidence of the plaintiff. I find that on or about the 8th of November 1999 the defendant re-attended upon the plaintiff's residence. The plaintiff gave the defendant the unsigned memorandum of lease (ExP8) for the defendant to read. The defendant may not have understood every word of the document but the defendant knew what he was looking for. He firstly looked at how much money he had to pay (this being his major consideration) and was satisfied with what he saw on ExP8. He understood that he had to pay $25,000 in the first two years and $30,000 in the remaining three years. He next looked at when the money had to be paid and understood his obligations in that regard and was happy with it. He paid $10,000 upon signing. He then looked to check as to how many years the agreement was for and understood that it was to be for five years. He was happy to have the agreement for five years. The next thing the defendant wanted to check was what he had to do under the agreement and understood that it was his responsibility to look after the trees and provide fire breaks.

41. In paragraph 2(b) of his defence the defendant alleges that:

> "The plaintiff required his signature forthwith, and he was not given an opportunity to seek independent legal advice relating to the document."

I reject this. On the evidence I find that the plaintiff did not put any pressure upon the defendant to sign ExP8 forthwith. There is no evidence to suggest

that the defendant wanted to seek legal advice on the agreement. If he had wanted to there is nothing in the evidence to suggest that the plaintiff would not have allowed him to. I find that the defendant chose not to seek any legal advice as he didn't want to incur the expense of doing so, and he was satisfied with his understanding of the agreement.

42. It appears to be common ground between the parties (although it is not clear from the written agreement) that the "lease" was only in relation to the Kensington Pride variety of mango trees of which there were about 550. On it's face, ExP8 purports to lease the whole property "together with all fixtures and fittings, chattels, effects and machinery" on the blocks to the defendant. Mr Cantrill submits that the schedule "makes it clear" that the agreement was only for the 550 trees. I reject that. The schedule makes it clear that there was only "irrigation to approximately 550 mango trees", but is otherwise silent on the topic. It further purports to place obligations upon the defendant "to maintain the property at all times in a clean, tidy and sanitary condition". I do not know why this was the case. It may have been that the other trees were not yet fruiting, or were of no commercial value. It could be that the defendant wasn't interested in them for some reason. In the absence of evidence on this I cannot speculate. There is nothing from the evidence, or from ExP8, to suggest that the other trees were expressly excluded from the agreement. Nor is there anything to suggest that the plaintiff retained her rights in relation to those trees, or her right to possession of that part of the property on which they were located. Simply the evidence is effectively silent in this regard.

43. I therefore find that ExP8 was an agreement in relation to the whole of the block (albeit that the parties were only interested in the approximately 550 trees of Kensington Pride mangoes). The defendant had an obligation to maintain fire breaks to protect the whole property the subject of the agreement. He also had obligations not to damage anything, and make good any damage, and remove any fixtures and fittings that he may have installed,

and generally leave the property in the same or similar condition as he found it.

44. It was an issue between the parties as to whether the agreement was a lease or a mango agreement. The document clearly purports to be a lease. The defendant asserted that he did not understand that he was entering into a lease, but believed he was entering into a mango agreement. Mr O'Loughlin asserted in his submissions that: "this misunderstanding on behalf of the defendant is not relevant as it is clear from his evidence that he understood the relevant terms of the lease, namely that he was to pay the plaintiff an annual amount for five years, he was to prune the trees, and he would have the rights to the mangoes." I agree that the defendant understood his obligations under the agreement, although (as will become apparent later) he did not fulfil them.

45. ExP8 is riddled with words and phrases which clearly indicate that it is a lease rather than an agreement. The word "lease" appears twice; the word "lessor" appears eight times; the word "lessee" appears five times; the word "rent" appears three times; and the word "sublet" appears once, in the two main pages of ExP8.

46. At pages 18 to 21 of his written submission Mr Cantrill seeks to rely upon the doctrine of "mistake". I have read and considered this submission. On the facts of this case I find that both the plaintiff and defendant knew they were signing a "lease". In the mind of both the plaintiff and the defendant they did not believe there was any difference between this and a mango agreement. There was no taking advantage by one against the other. By whatever name the agreement was titled, they wanted to enter into it, and they both agreed with the terms that were contained in it. It was not suggested in evidence that the defendant did not see the word "lease" and that if he had he would have insisted that it be removed before signing.

47. It is likely that both the plaintiff and the defendant were ignorant as to the full legal ramifications of a lease, as most people would be. However, I find

that what the parties intended was in legal effect a lease and that is what they achieved. The plaintiff did not live on or near the blocks. She had no wish to retain any rights to possession in herself, and she did not do so. She intended that the defendant would be wholly responsible for the care and management of the block. The defendant understood this and accepted it.

48. I do not find that the defendant was mistaken. He signed the document in the full knowledge of the relevant terms. He may have been ignorant of the legal consequences. He may have considered the terminology irrelevant. He most probably didn't care what it was called. He was only interested in getting the trees because he believed he could make money from them. In any event, even if the defendant was mistaken (which I am unable to be satisfied he was), I do not find that he would not have signed ExP8 if he had realised it was a lease. On the contrary, I find that he would have.

49. If there was any mistake by the defendant it was that he believed he could make more money than he ended up making. In that regard any such mistake was his own, and the plaintiff in no way contributed to it. Further, the defendant failed to comply with his pruning requirements (both under ExP8, and in accordance with good farming practice) and thought this would have no effect. In this regard he was also mistaken, but again the plaintiff in no way contributed to it. The defendant was in the mango business and he made a commercial decision. He was not induced by the plaintiff. On the evidence he was unconcerned about the height of the trees, and it transpired that he had trees of similar height on his own property.

50. Even if there was a mistake (which I find there wasn't) I would not find that the plaintiff was aware of any potential mistake by the defendant in any event, or that she did anything wrong or unconscionable. She had leased the blocks to the Wilson's for more money in the previous years. There was no evidence to suggest that the Wilson's had not made money, or that they had told the plaintiff of any problem in this regard.

51. There is also, in my view, nothing in ExP8 that requires rectification.

52. A lease is more than a contract. For nearly 500 years it has been recognised that a lease is not a mere contract but creates rights "in rem", that is to say, an estate or interest in the land demised: *City of London Corporation v Fell* (1993) 4All ER 968 (HL). In that decision the House of Lords approved the dictum of Nourse J in the Court of Appeal (at (1993) 2 AllER 453):

> "A lease of land, because it originates in a contract, gives rise to obligations enforceable between the original landlord and the original tenant in contract. But because it also gives the tenant an estate in the land, assignable, like the reversion, to others, the obligations, so far as they touch and concern the land, assume a wider influence, becoming, as it were, imprinted on the term or the reversion as the case may be, enforceable between the owners thereof for the time being as conditions of enjoyment of their respective estates. Thus landlord and tenant stand together in one or other of two distinct legal relationships. In the first it is said that there is privity of contract between them, in the second privity of estate……A "tenant", both by derivation and by usage, is someone who "holds" land of another, for which purpose it is immaterial whether he does so by contract or by estate."

The defendant had an interest in the property in question in this action as he had the right to sub-let all or part of the land, albeit only with the prior approval of the plaintiff.

53. The giving of the right to exclusive possession is an essential characteristic of a lease: *Prudential Assurance Co Ltd v London Residuary Body* (1992) 3 All ER 504 at 506. In fact it has been said that the only necessary characteristic of any tenancy is that it should give the right to exclusive possession to the tenant for an ascertainable period: *Commonwealth Life (Amalgamated) Assurances Ltd v Anderson* (1945) 46 SR(NSW) 47*; Radaich v Smith* (1959) 101 CLR 209; *Greco v Swinburne Ltd* (1991) 1 VR 304 at 313.

54. In paragraph 3 of his defence the defendant pleads that: "The Property was fenced but the gates were unlocked and he was given no keys, nor did he receive exclusive possession." There is no evidence from the defendant to support this assertion. There is no evidence to suggest that any other person

(apart from the plaintiff) had or took any right to access the blocks. There is no evidence to suggest that the plaintiff attended other than very infrequently upon the blocks. On the plaintiff's evidence the gates were unlocked because the fire brigade needed access in the event of a fire.

55. In the instant case the agreement (ExP8) clearly granted the right to exclusive possession in Lots 45 and 46 to the defendant for a fixed period from 1 December 1999 until 30 November 2004. All the land was leased to him. There is no suggestion that the defendant's rights would be subject to any other persons rights. There was no suggestion of any co-existing agreement with any other person. This is further made clear by clause 4 of ExP8. In that clause the plaintiff does not have unrestricted access to her own property. It is only the defendant who had that. The plaintiff (during the period of the lease) was only allowed reasonable access, and then only by prior arrangement with the defendant. It may have been that the plaintiff did attend on one occasion (after receiving the letter re fire-breaks) without prior arrangement, but if so, she was in breach. In the scheme of things this would have been a minor breach.

56. I therefore find that the agreement was for the lease of the property including the trees thereon. The defendant had the right to exclusive possession of the whole of the block and had obligations (the major one was the payment of rent, and others included such things as making fire-breaks, pruning, maintaining and irrigating) under the lease.

57. I do not accept the defendant's evidence that he did not understand that he was entering into a lease. It is clear, and I find, that he had an understanding of what a lease was before he signed ExP8. In addition, when he paid the plaintiff the rent that he owed her in the latter part of 2001, the defendant filled out the details in his cheque stub as "Hazel Brockman Lease" (ExD2).

58. The defendant was sufficiently aware of the contents of ExP8 as to notice that there was nothing in relation to using chemicals. The defendant was desirous of trying to encourage early fruiting of the mango trees (to ensure

the best possible price in southern markets). He therefore wanted to ensure that he could use chemicals. There was some discussion about this at the time of signing and the defendant advised that he would use cultar. The defendant wanted something in the agreement to allow him to do this. Accordingly, the plaintiff hand wrote onto the schedule of goods and chattels attached to the agreement the following words:

> "This agreement covers (Paul) Phuc Cong Dinh to be able to work the trees and apply chemicals for early fruiting."

This addition was signed by the plaintiff in the presence of the defendant. The defendant was then happy with the agreement and he left taking his copy. He could have had the agreement translated to him or checked by his solicitor at any time if there was anything that he was unsure about. He didn't. I note that there was no agreement about the defendant using any other method to produce early fruiting, such as tying string around the trees in order to put them under stress. I find that this was not an express or implied term of the original contract.

59. There was a dispute between the parties as to whether the defendant received a copy of the schedule from the plaintiff. The defendant denies that he did. It is clear that the defendant knew there was a slasher included in the agreement, and he could only have known this from a perusal of the schedule, as he has not given any evidence of any other source of this knowledge. I therefore find that the defendant was given a copy of the schedule with the additional words written on. The defendant may have lost or misplaced it and therefore assumed he didn't receive it.

60. Whilst the word "pruning" does not appear in ExP8 (in paragraph 9 the defendant had to "cultivate the land in a good and proper manner….and maintain and keep preserved to the best of their ability all mango trees therein"), it is clear from the evidence of both the plaintiff and the defendant that it was understood and accepted by both of them that the defendant would prune the mango trees. It was (on the evidence of both the plaintiff and defendant) because of the need to prune the trees that a reduction in the rent was negotiated for the first two years. Accordingly, the defendant had been allowed a $10000 reduction in rent to take account of

the need to properly prune the trees. I therefore find that it was an express oral term of the agreement that the defendant would prune the mango trees. There was no express agreement as to how often or how this would be done. I therefore find that it was an implied term that the defendant would prune the trees as may reasonably have been required from time to time.

61. Clearly, given the size of the trees and given the fact that the defendant wanted a $5,000 reduction for each of the first two years the defendant knew and anticipated that he would have to do some quite considerable pruning at least in the first two years. Given that there was to be no allowance for the remaining three years it would logically follow that the defendant intended to substantially prune the trees back in the first two years so that only normal pruning would be required thereafter.

62. In his counterclaim the defendant:

> "CLAIMS a declaration that any contract found to exist between the plaintiff and the defendant is in all the circumstances unconscionable and seeks a further order that any such contact be set aside…"

63. As noted earlier, on the evidence of both the plaintiff and the defendant there were no representations made to the defendant about the state of the trees, about the size of the trees, about the quality of the fruit or anything else. On the evidence, I find that the defendant did not rely upon anything said by the plaintiff in deciding to enter into ExP8. Rather, he relied upon his own knowledge and judgement. The defendant was happy with the agreement and did not see any point in obtaining any legal advice upon it.

64. In *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 at 462 Mason J referred to:

> "…an underlying general principle which may be invoked whenever one party by reason of some condition or circumstance is placed at a special disadvantage vis a vis another and unfair or unconscientious advantage is then taken of the opportunity thereby created. I qualify the word "disadvantage" by the adjective "special" in order to disavow any suggestion that the principle applies whenever there is

> some difference in the bargaining power of the parties and in order to emphasize that the disabling condition or circumstance is one which seriously effects the ability of the innocent party to make a judgment as to his own best interests, when the other party knows or ought to know of the existence of that condition or circumstance and of it's effect on the innocent party." (emphasis added)

65. In the *Amadio case* the facts were that two elderly migrants who were unfamiliar with written English were asked by their son to execute a mortgage in favour of a bank over land which they owned to secure the overdraft of a company which the son controlled. The son had told his parents that the mortgage was to be limited to $50,000 and to be for six months. The bank and the company had been selectively dishonouring the company's cheques to preserve the company's appearance of solvency. The bank and the company agreed that the overdraft the mortgage was to secure should be reduced and cleared within a short time, but these matters were not disclosed to the prospective mortgagors. The mortgage instrument which the bank submitted for execution contained a guarantee. The mortgage and the guarantee secured all amounts owing or which might be owing to the bank on the company's account. The mortgagors executed the deed mistakenly believing it to be limited to $50,000 and to be for six months. The bank was aware that they had been misinformed about the contents of the instrument they were executing. These facts are substantially different to the facts in the instant case.

66. The "disabling condition" relied upon here is the defendants limited ability to read English. I accept the plaintiff's evidence that the defendant told her that he could read English and that he did in fact appear to read it in her presence. I therefore find that the plaintiff had no reason to believe or suspect that the defendant had any difficulty understanding ExP8. As such there was no "guilty" or "innocent" party in the instant case. I do not find that the plaintiff tried to take advantage of the defendant. The defendant had a good understanding of what the agreement was about (as referred to above) and his understanding generally accorded with the understanding of the plaintiff. If there had been evidence that the plaintiff knew or suspected

that the trees were or might be uneconomical (or of reduced value) due to their size (or some other condition) then that may have been relevant. However, there is no evidence to suggest that this was or might have been the case.

67. Further, the defendant was actively involved in the production, picking and marketing of mangoes when he was negotiating the agreement herein. He was (I find) in a better position than the plaintiff to decide if he could make a profit from the plaintiff's property. He successfully negotiated the price down by $5,000 for each of the first two years. I find that the defendant was not under any special disadvantage vis a vis the plaintiff. I find that the plaintiff did not take any unfair advantage of the defendant. I find that ExP8 was not unconscionable.

68. As and from about the 8th of November 1999 the defendant had the right to enter upon the plaintiff's land at any time and do whatever work was reasonably necessary in order to protect and cultivate the trees in order to maximise his income from the property.

69. At the end of November, or in December 1999 the defendant had some workers in to do some pruning. One of these workers was Ly Van Hiep. He gave evidence before me. He was employed to do the pruning and there were about six to eight other people there as well. He did not appear to have been given any equipment to assist in the task apart from using a saw. There was no evidence of any platform, cherry picker or other device used to help. Ly was expected to climb the trees and cut the branches for pruning. Without the use of any equipment he was only able to cut the lower branches. He did this for about one week but decided it was too dangerous and stopped working and left. He estimated that in the time that he was there between 50 to 100 trees were pruned, but only by cutting the lower branches.

70. It appears that the next attempt at pruning the trees occurred in the year 2000. The defendant said that this was done in November/December of that year. This is contrary to the evidence of Pham Thi. He said that it was in

about the middle of the year. Pham Thi was a person who described himself as a consultant to Vietnamese people who want to work mango farms. As to his qualifications as an expert I am not satisfied on the evidence that he does so qualify, as there was insufficient evidence called to enable me to make this finding. He says he went there to help and to show other Vietnamese people how to prune the trees and how to take care of the trees. He saw the trees were so high and he spoke to the defendant and told the defendant that he can't prune the trees by hand and it must be by machine.

71. There is no evidence to suggest that the defendant adopted this advice and ever used a machine to prune the mango trees during the period of his lease. There is evidence of a cherry picker at some time causing some damage, but I was not told whether this was in the process of pruning, picking or what.

72. On all the evidence I find that the mango trees had been neglected for many years and in particular they had not been pruned regularly as they should have been. As a consequence, the trees were allowed to grow too high and too wide. I find that the trees in question were to a height of about fifteen metres. In addition, the trees had been allowed to grow too wide such that the branches were growing into adjoining trees. This would make it difficult (if not almost impossible) to move between the trees for the purpose of picking.

73. The defendant did not call any evidence as to how much money he expended on pruning during the period of the lease. If he had expended $10,000 or more then it would have been in his interest to inform the court of this. His evidence is silent on this, and no documents were produced to establish that any amount was in fact incurred.

74. I find that the defendant (not being the owner of the land or trees) was not particularly concerned (if at all) about the long-term viability of the trees. His only concern was to make as much money as he could from the trees in the five years of his agreement. On the evidence I am unable to find that the defendant was overly knowledgable about proper farming practices. He

appears to have been motivated more by money. I find that his belief was the bigger the tree the more fruit it would produce, and hence hopefully the more money he would make.

75. Similarly, the plaintiff's concern was to receive an ongoing income from the trees without having to do much (if anything) herself. Naturally, she would have been interested to ensure that her ability to maintain an income from her property was maintained. As such it would have been in her interests to ensure that her trees were properly pruned and maintained at all times. However, it does not appear from the evidence that she did this. Rather, it appears that she just sat back expecting the lessees to do this without checking up regularly or at all.

76. The defendant appears to have given up on the pruning of the trees by mid 2000. Apart from the two attempts at pruning referred to above I was not informed of any further or better attempts. As noted above I do not know how much of the agreed $10,000 reduction for pruning was in fact expended by the defendant. The defendant agreed that at no time did he cut the tops off of the mango trees under his care to bring them down in height.

77. On the evidence there is no suggestion that the defendant complained to the plaintiff about the trees or the state of the trees during the first year of the agreement. Nor did he advise her as to what should, or might, be done in relation to the trees. There is no evidence to suggest that the defendant ever told the plaintiff that there might be a problem with the trees on the block. He did not suggest that more pruning might be needed than he had anticipated. Rather, he appears to have simply given up on the idea of pruning.

78. I find that the defendant was in breach of the lease (as alleged in paragraph 5(c)(vi) of the Particulars of Claim) in that he failed to properly prune the trees during the period of the lease. I find that he should have used equipment to prune the tops, sides and bottoms of the trees as soon as possible after the lease commenced on 1 December 1999. He did not do so.

If had done this, then the problems referred to later in this decision may not have arisen.

79. The plaintiff received a letter dated 30 May 2000 from the Bushfires Council (ExP5) about the inadequacy of her firebreaks. Upon receipt of the letter she rang the defendant to advise him of the contents. The defendant advised her that the firebreaks were done. Consequently the plaintiff travelled out to inspect her properties. Upon arrival she noted that grass (almost as tall as herself) was growing all over where the firebreaks should have been. As a result of this she rang the defendant again. However, he advised her that he had done the firebreaks already and he would not do them again as it was too costly. In his evidence the defendant said he had slashed (using the plaintiff's slasher) but only around the mango trees that he was looking after.

80. On the evidence I find that the defendant breached the agreement (as alleged in paragraphs 5(b) and 5(c)(i) of the Particulars of Claim) in the middle of the 2000 year by not providing and maintaining adequate firebreaks as he was required to do. The plaintiff proceeded to arrange for this to be done.

81. Also around this time the defendant complained to the plaintiff that there was not sufficient irrigation in place for the trees. As a consequence it was agreed that the defendant would attend to fixing this and the cost would be deducted from the next payment. Accordingly, when $15,000 became due on 15 September 2000 the defendant only paid $14,463. It is not disputed that this was the correct amount owing.

82. During the first year the defendant said that he put string around the trees to stress them and therefore fruit early. He said that he had spoken to the plaintiff about it and she said yes. I do not believe this evidence. He said that the plaintiff complained about it in 2002. The plaintiff said in cross-examination that she would have objected to the defendant doing any permanent damage to the trees. She was directed to photo 1.17.4 of ExP11. She said that she saw ring-barking in the photos. There was a definite ring

around the trunk of the tree in that photo, and a less clear second ring also. Another tree behind and to the right of the tree in the foreground shows two clearly distinctive rings. On the evidence I find that the plaintiff would not have given approval to the defendant to mark her trees in this way. I find that she did not. The defendant had express permission under the lease to "apply chemicals for early fruiting", but nothing further. I find that there was no express or implied term or variation of the lease to allow the defendant to ring any of the trees for any reason. It appears that (in breach of the lease, as I find he had no authority under the lease to do what he did) the defendant ringed a number of the plaintiff's trees in each of the two years that he took fruit under the lease. The evidence does not enable me to decide how many trees were ring-barked by the defendant. I find that the breach alleged in paragraph 5(c)(iii) of the Particulars of Claim has been made out.

83. The defendant picked the fruit off the trees in the 2000 year and sent it off to market interstate. He said that he believed the quality of the fruit was good while he was picking it. He went on to say that his agent later advised him that there was some problem with the fruit, namely black spot and anthrac nose. He went on to say that the price he got for this fruit wasn't good. He thought he got $17, and the low price was $7. I note that no direct evidence was led from any person who saw the mangoes as to any actual problem with the mangoes from the plaintiff's property. I am unable to be satisfied on the balance of probabilities that the mangoes did have blackspot (or if they did, how many and to what extent) or anthrac nose (or if they did, how many and to what extent).

84. Before trial the defendant discovered no documents relating to financial matters. In particular there were no documents discovered showing what amounts were expended by the defendant for pruning, for slashing, for chemicals, for firebreaks, for picking, for packing, for freight or anything else to do with this property. Nor were any documents discovered concerning the income from the mangoes. During cross-examination the

defendant started to provide some documents for the first time, but only when the plaintiff requested and insisted upon it. This reticence does not do the defendant any credit.

85. In relation to the 2000 season the defendant eventually produced a number of tax invoices from Silk Bros (Melb.) Pty Ltd. These initially were marked MFI A but they eventually became ExD3 during the evidence of his wife, Lieu Thi Le ("Lieu"). These pre-dominantly have been written out in pencil. Those entries that are in pen have often been written over a white-out deletion. I do not know who made the changes, when or why. Both the plaintiff and this Court have been asked to accept that these documents all relate to the plaintiff's property, and that these show all the mangoes removed therefrom. The defendant in his evidence said that he sent his mangoes as well but ExD3 was from the plaintiff's farm. Neither the defendant or his wife provided any satisfactory reason for me to accept this assertion as being true. Neither of them were able to point to anything on the tax invoices themselves to establish the likely truth of the assertion. Nor were they able to take me to any other business record to support the assertion. The defendant's wife said that she put what farm particular fruit was from on the pallet. However, she did not show to my satisfaction that this was recorded anywhere on any of the documentation tendered in evidence before me. In the absence of such evidence I do not accept the assertion as being true, but nor do I find that it is untrue (as there is no evidence on which I could make such a finding). I am therefore unable to be satisfied on the balance of probabilities that ExD3 sets out the full and accurate picture of all mangoes removed from the plaintiff's property.

86. In addition to ExD3 Lieu also produced ExD4 and ExD5 which she said all related to the 2000 crop and to the plaintiff's farm. Again, there is nothing noted anywhere on any of these documents to satisfy me that they do relate to the plaintiff's farm.

87. I will proceed to consider ExD3 further in any event. An analysis of ExD3 discloses the following:

Date	Tray	Price $	Grade	Bulk Packs xkg	Price $	Gross $	Freight	Handling	GST	Nett $
16.10.00	161	38x$14 55x$16 68x$18	Class 1	16x20	28	3084	467.95	17.70	48.57	2549.78
18.10.00	680	680x$8	No 2			5440	1598	68	166.60	3607.40
20.10.00	680	135x$11 141x$14 160x$7 126x$6 136x$2 2xwaste	CL-1 CL-1 Regrade Rejects Class 2	2x10	7	5401	1606.40	68.20	167.46	3558.94
23.10.00	544	85x$7 36x$7.50 332x$9 91x$4	Rejects			4217	1278.40	54.40	133.28	2750.92
24.10.00	816	816x8.50	good			6936	1917.60	81.60	199.92	4736.88
24.10.00	1632	136x$6 370x7.50 1126x$8	Class 2 Good Good	108x10	7.50	13409	4288.80	174	446.28	8499.92
25.10.00	270	270x6.50	Class 2 Anthracnose	96x10	8	2523	1037.70	36.60	107.43	1341.27
26.10.00	528	528x$5	Class 2 Anthracnose			2640	1240.80	52.80	129.36	1217.04
27.10.00	136	136x$9				1224	319.60	13.60	33.32	857.48
30.10.00	272	272x$9	Good			2448	639.20	27.20	66.64	1714.96
01.11.00	1496	680x$9 136x$7 680x5.50	CL 1 Good CL 2			10812	3515.60	149.60	366.52	6780.28
TOTAL	**7215**			**2380**		**58134**				**37614.87**

88. If these figures are the accurate and complete figures for the fruit removed from the plaintiff's property in the 2000 season then they suggest that:

- A total of 7235 trays of mangoes were received by Silk Bros;
- Of these 1117 trays were noted to be of class 1 quality (15.4%)
- 2720 trays were noted to be of good quality (37.6%)
- 2430 trays were noted to be of class 2 quality (33.6%)
- 589 trays did not have their quality noted

- 160 trays were marked as “regrade”, but I’m not told what that means (2.2%)
- 217 trays were marked as “rejects” or “repacks” (3%)
- and 2 trays were marked as “waste”; and
- 2380kgs of bulk packs were received by Silk Bros.

89. What does all this mean? The defendant did not produce any figures or documents relating to other mangoes that he sold during the 2000 season. I therefore have nothing to compare these figures with. I am unable to find that the prices obtained were bad prices compared with other produce. I have no evidence from which I could find that the price of mangoes was somehow different at the relevant time compared with the figures in ExD3. I am unable to find that the range in quality was unusual compared with other mango crops. I do not know what the prices were like in 2000, or whether this was a good year for prices or what.

90. The defendant has with-held his financial records and mango records from the plaintiff. He has done so without any good explanation. His records have reluctantly been produced in a piece-meal fashion and only at the insistence of the plaintiff. When finally produced it is only those matters said to relate to this matter that have been forthcoming, and the plaintiff has had no opportunity to verify this to be so.

91. In cross-examination Mr O’Loughlin invited the defendant to produce documents showing that he made a loss on the plaintiff’s farm. The defendant said that he couldn’t as he puts the whole lot in for his farm and other farms. When asked how he could say to the plaintiff that he was losing money the defendant said he can show what money for pallet. He said he had this in the computer and would provide it (it should have been provided well before this). Eventually documents were produced through Lieu. Looking firstly at ExD5 this disclosed as follows:

Date	7kg Trays	Price/Tray	Boxes	Price/Box	GST	Total
16.10.00	161	2.70	16x10kg	3.20	48.59	534.49
18.10.00	680	2.70			183.60	2019.60
20.10.00	680	2.70			183.60	2019.60
23.10.00	544	2.70			146.88	1615.68
23.10.00	136	2.70			36.72	403.92
24.10.00	816	2.70			220.32	2423.52
24.10.00	1632	2.70			440.64	4847.04
25.10.00	270	2.70			72.90	801.90
26.10.00	528	2.70			142.56	1568.16
26.10.00	680	2.70			183.60	2019.60
27.10.00	136	2.70			36.72	403.92
30.10.00	272	2.70			73.44	807.84
01.11.00	1496	2.70			403.92	4443.12
TOTAL	**8031**		**160**			**23,908.39**

92. And then ExD4 stated:

Date	Trays	Price/tray	Boxes	Price/box	GST	Total
01.11.00	8,031	5.20 (Pick & Pack)	16x10	2.50	4180.12	45,981.32

93. In both sets of invoices the item number for the trays is the same, namely "07TM Packing", as it also is for the boxes, namely "10BM Packing". Also, all of the documents forming ExD4 and ExD5 were in pristine condition and gave the appearance of having been freshly generated. The explanation for this is that they appear to have been printed off the defendant's computer expressly for this case. No source documents were produced or tendered in evidence.

94. Each of the documents forming these two exhibits appear on their face to be internal accounting documents. They have been printed on the letterhead of "VN Farm NT Mango & Mudcrab" and purport to "Bill to: V N Farm". No breakdown was provided in the evidence as to how the unit prices of $2.70, $3.20, $5.20 or $2.50 have been arrived at. I am unable on the evidence before me to be satisfied that they are (or are not) true and accurate figures. I have no evidence from which I could conclude what was the real cost to the defendant of picking and/or packing the fruit from the plaintiff's property in the 2000 season.

95. Other anomalies appear when ExD4 and EXD5 are compared with each other and with ExD3:

- In ExD3 there were 7215 trays, and yet in ExD4 and ExD5 there are 8031 trays;
- In ExD3 there were 2380 kgs of bulk mangoes, yet in ExD4 and ExD5 there is only 160 kgs;
- There are 12 invoices in ExD5, but only 11 invoices in ExD3;
- Invoice dated 16.10.00 in ExD5 appears to correlate with the invoice bearing the same date in ExD3. Yet in ExD3 the bulk packs are 20kg, and in ExD5 they are 10kg;
- Invoice dated 20.10.00 in ExD5 appears to correlate with the invoice bearing the same date in ExD3. Yet in ExD3 there were 2 x 10kg cartons which appear nowhere in ExD5;
- Invoice dated 23.10.00 in ExD5 appears to relate to invoice dated 27.10.00 in ExD3, but the difference in dates seems somewhat odd given the general correlation of other dates between the two separate exhibits;

- Invoice dated 24.10.00 in ExD5 appears to correlate with the invoice bearing the same date in ExD3. Yet in ExD3 there is also 108 "VOL pack" which doesn't appear in ExD5;

- Invoice dated 25.10.00 in ExD5 appears to correlate with the invoice bearing the same date in ExD3. Yet in ExD3 there is also 96x10kg "ctn vol packs" which doesn't appear in ExD5;

- Invoice dated 26.10.00 in ExD5 for 680 trays does not relate to any invoice in ExD3. There are two invoices in ExD3 relating to the figure of 680 trays, but three invoices in ExD5 relating to 680 trays;

- Lieu said in evidence that the plaintiff's fruit only went to Silk Bros, and yet the extra 680 trays doesn't appear in ExD3 which she says is all the Silk Bros invoices relating to the plaintiff's farm for the 2000 season;

- In the invoice dated 16.10.00 in ExD5 the charge (to themselves) for "packing" the 16x10kg boxes was $3.20 per box, yet in ExD4 it becomes $2.50 per box. No explanation for this difference is given, and whereas in ExD4 the price is stated to be for "pick and pack" in relation to the trays, no such notation appears in relation to the bulk boxes;

- In ExD5 the price for "packing" the 7kg trays is stated to be $2.70, and in ExD4 this becomes $5.20. The notation "(pick and pack)" appears but it is not explained in evidence whether this $5.20 includes the figure of $2.70, such that they charge themselves $2.50 per tray to pick it plus $2.70 per tray to pack it. Nor is it explained (if this is the case) why it costs more to pack than it does to pick;

96. No explanation for these anomalies was offered in evidence. To be fair, no explanation was sought either. Given the way that the documents were extracted from the defendant it is not surprising that neither counsel nor myself had any reasonable opportunity to analyse the documents during the course of evidence. It was only after completion of the evidence that I have

been afforded the opportunity to look at the documents more closely. In relation to these documents for the 2000 season Lieu was asked whom she paid for transport, and she replied VN Transport, my company too. Yet on the face of ExD3 this is not correct. Only the invoice dated 20.10.00 has "VN" as the "transport". All other invoices state the transport as "Toll", with the exception of the invoice dated 16.10.00 which doesn't specify the transport at all.

97. In addition, Lieu was asked in her evidence how much of the $2.70 per box (being the amount for packing the trays they charged themselves on ExD5) was paid out in transport expenses, and she replied that it was roughly about $2.40 or $2.50. She was then asked how much of the $3.20 (being the amount they charged themselves for packing the bulk boxes on ExD5) and she said $3. She was then asked whether the invoices show the cost of transporting the mangoes to market and she said yes. I have trouble accepting this evidence for a number of reasons:

- The cost of freight is already included and deducted from the Silk Bros invoices ExD3;
- If the defendant is further allowing for freight/transport in ExD5 then it is not clear why, as $2.35 per tray has already been deducted in ExD3;
- All of the invoices in ExD5 on their face purport to relate to "packing" and not "freight";
- All of the invoices in ExD5 have a reference to "freight" at the bottom right of the page, and in every case "freight" is recorded as "$0.00".

I reject the evidence of Lieu on this topic.

98. The defendant asserted that if the price of a pallet of mangoes was less than $17 he lost money. No explanation was given as to how this figure was arrived at. No documents were tendered by which I could find that this is true. Assuming for the moment that all the documents tendered in the

defendant's case are true and accurate then this would suggest that it might cost:

$5.20	per tray to pick and pack (ExD4)
$2.35	per tray for freight (ExD3)
$0.10	per tray for handling and inspection (ExD3)
$7.65	in total plus 10% GST ($0.76)
$8.41	**per tray**

There was insufficient evidence from which I could find where the other $8.49 per tray might come from to make up the supposed necessary amount of $17 before the defendant made any money. I therefore give this statement no weight. Even for class 1 or good quality mangoes in ExD3 he only received $17 or above on the one invoice dated 16.10.00, when he received $18 per tray for 68 trays. Thereafter for "grade 1" mangoes he only received between $9 to $16 for the other 1049 trays. And for "good" quality mangoes he received between $7 to $9 for the 2720 trays.

99. If the mangoes were "grade 1" or "good quality" then any low price must relate to the market rather than the quality. Looking at ExD3 there were a total of 3973 trays of "grade 1" or "good" quality mangoes received by Silk Bros from the defendant (including 136 on invoice 7221 where no quality was recorded, but I assume it must have been at least "good" because of the price). The total price paid for these were $35,558. This equates to an average price of $8.95 per tray. On the evidence I am unable to find that this average price had anything to do with any problem with the fruit.

100. According to the defendant's income tax return for the year ended 30 June 2001 (ExD9) his business had a gross income of $1,718,286 and a nett profit of $106,662.

101. I do not accept on the balance of probabilities that ExD3 does include all the mangoes from the plaintiff's property. Further, I do not accept on the

balance of probabilities that ExD5 truly reflects the actual cost of transporting (or packing) the plaintiff's mangoes. Nor do I accept on the balance of probabilities that ExD4 truly reflects the actual cost of picking and packing the plaintiff's mangoes. ExD4 and ExD5 are clearly documents that have been internally created. They are both self-serving documents. There was no evidence (apart from the bald assurances of the defendant and Lieu) that would enable me to be satisfied that they were genuine. No wages or employee records were produced. I do not know how many people worked on picking the plaintiff's fruit in the year 2000, over how many hours, and at what hourly or other rate. I do not know what the cost of a carton or box was. I know nothing of the cost of getting the mangoes from the plaintiff's property to where they were packed. I do not know where they were packed. I know nothing of the real cost of transport when the defendant used his own vehicles (including hire, fuel, driver's wages or other expenses).

102. I now return to the chronology.

103. According to the plaintiff she had a telephone conversation with the defendant in January 2001 when he informed her that he could not afford to pay her the $10,000 due on 30.1.01, and he would pay her the full amount of $25,000 due on 15 September. In cross-examination it was put to her that she was told by the defendant that this was because he was in financial trouble, and was not making money from the agreement. The plaintiff disagreed with this and said that the defendant had something else to do with the money (a business deal or something). The plaintiff accepted this and hand wrote onto the agreement next to the 2001 payment schedule the words:

> "TO BE PAID $25,000 15TH SEPT 2001"

104. The plaintiff said that nothing else was said about rent on that occasion.

105. The defendant says that he spoke to the plaintiff at her house during the 2000 season when it was time to pay her. The defendant said in evidence

that he told her that he was in trouble and wanted out of the agreement. He says this was about October after he had sent fruit to market and been informed by his agent of anthrac nose. This evidence is supported by Lieu. She said that she met the plaintiff in her house after the mango season when we paid her the money for her first time, and she remembered the defendant told the plaintiff words to the effect of "mango no good", "we got problem", "we lose money", "we want to stop". The plaintiff denies that any such conversation occurred in the year 2000. I do not accept the evidence of the defendant and Lieu. I find that it is untrue. It is clear (and I find) from the evidence of the plaintiff (as supported by ExP4) that the defendant paid the September 2000 payment (less the deduction for irrigation equipment) on or before 29 September 2000 (at the latest), as this is the date that the money was deposited into the plaintiff's bank account. It is also apparent from ExD3 (which the defendant says are the documents relating to the plaintiff's property) that the first date that mangoes were received by the agent was 16 October 2000, and therefore well after the September payment was made. In addition, the very first mention of "anthrac nose" on the documents in ExD3 appears on the document for the mangoes received on 25 October 2000. Again well after payment had been made. There was no other payment made by the defendant between September 2000 and September 2001. It was therefore, in my view, impossible for any such conversation to have occurred when they paid the money on or before 29 September 2000.

106. The defendant was not aware (on his evidence) of any problem with the fruit until he was advised by the agent after it had gone to market, and therefore he could not have been aware of any potential problem until 16.10.00 at the earliest, as this is the first invoice which has any mangoes of less quality than "grade 1".

107. The defendant in his evidence went on to say that a variation to the agreement occurred in about October 2000 when he told the plaintiff that he had lost a lot of money and couldn't "do" for next year. He went on to say that the plaintiff begged him to keep going saying she was too old to look

after the trees herself. He said he agreed to continue because of this, and because she reduced the price to $25,000 a year and because they would each look for someone to take over the lease. This evidence is also denied by the plaintiff. For the reasons noted in the preceding paragraphs I find that the conversation referred to by the defendant did not occur at all. I prefer the evidence of the plaintiff.

108. During 2001 the defendant continued to work on the plaintiff's property. He said that he was still pruning, fertilising, checking the sprinklers, spraying etc. I find that the pruning the defendant did (as referred to earlier in my findings) was not adequate or sufficient. On the defendant's own evidence (as supported by ExD3) he became aware of defects in the quality of the fruit (probably in mid October 2000 at the earliest). The alleged defects were black spot and anthrac nose. He clearly should have been aware that the presence of any such defects would adversely effect the price that he would obtain for fruit that he picked. As such it was in his interest to do something about it. On the evidence before me it appears likely that the cause of any such problem may have been the absence of sunlight on the growing fruit. Therefore, to remedy that the solution would appear to be to prune back the tops and sides of the trees to allow the sun to penetrate. On the evidence I find that the defendant did not adequately do this at the end of the 2000 season, such that ongoing problems were almost inevitable.

109. Also, as noted earlier, he probably re-ringed at least some of the trees in order to induce early fruiting. Again, this was done without the knowledge or consent of the plaintiff. The desire to encourage early fruiting was to get the fruit to market before others so as to get the best possible price. The decision to ring the trees was commercially driven rather than being good farming practice.

110. At some time in the 2001 season the plaintiff said that there was a discussion about a cherry picker which had broken some branches

apparently because the trees were too tall as they hadn't been pruned since 1999.

111. On 15 September 2001 the plaintiff says that the defendant personally attended upon her. He paid her the $25,000 that he owed (and she said that the receipt dated 4.10.01 – ExP6 refers). He then said to her that he wanted $5000 deducted from the price for the remaining three years of the agreement to prune the trees. The plaintiff agreed to a variation of the contract and ExP8 was amended and initialled accordingly. She also initially said that the initials on ExP8 were that of herself and the defendant. This was obviously not true but she maintained it. She later changed her evidence and recalled that another person had been briefly present and she got this person to initial the changes also.

112. The defendant in his evidence initially said that he didn't pay the plaintiff the money he owed for September 2001. He then said he would have to check his cheque-book. When he did he noted butt number 001334 dated 4.10.01. It was for $25,000 and he said that it was in his handwriting. As noted earlier, despite the assertion by the defendant that he thought he was only entering a mango agreement and not a lease I note that on ExD2 he wrote "Hazel Brockman Lease".

113. Given that the cheque butt is dated 4.10.01, and the receipt bears the same date it is not clear to me why the plaintiff maintained in her evidence that she received it on 15 September 2001. I am unable to find that the meeting did occur on 15 September 2001.

114. The defendant said that the plaintiff was ringing him asking for the money. He told her he had no money. The plaintiff told him he had to pay. I accept this evidence. It is clear from this that the agreement was still in effect and the plaintiff had not accepted any discharge thereof. Eventually the defendant wrote the cheque for $25,000 and gave it to the plaintiff. He said that he went to the plaintiff's house with his wife and children in about October 2001. He told the plaintiff words to the effect of "this year no more,

I finished". The plaintiff did not accept this and reminded him that he had signed an agreement. The defendant says he then told the plaintiff that he was still losing money on her mangoes. The plaintiff reminded him that the agreement was for five years. The defendant told the plaintiff that he wasn't going on, and the plaintiff again referred him to the agreement he had signed. The defendant left. It may well be that this is the conversation that the defendant and Lieu were referring to which they incorrectly ascribed to the year 2000.

115. On 20 November 2001 the plaintiff says that she visited her property with John Woodcock. She was not asked why. She was not asked whether she had or had not sought access as required by clause 4 of the lease agreement (ExP8). She said that they drove around the block and had a look. She noticed grass growing all over; the trees hadn't been pruned; the grass where the fire breaks should have been was 6 foot high.

116. Woodcock gave evidence before me. He also wasn't asked why he was there. He was a retired police officer. He had not been to the property before and relied upon the plaintiff's assertion that it was her property. He said that it was difficult to find the entrance to the block due to the tall grass. When they did enter he observed grass one to two metres high around the fence lines. He expressed the view that the grass appeared to be from the previous wet season. He observed no fire breaks.

117. Given the lack of evidence as to why the plaintiff and Woodcock went to the property I do not consider that I can speculate. I therefore cannot infer that it might have been because she was aware at that stage that the defendant was unwilling to continue with the agreement.

118. The plaintiff denies that she was told, in October 2001, by the defendant that he wanted out of the agreement. She says that the first conversation that she had with the defendant about this was in 2002 when the January payment was due. Given what she observed during her visit on 20.11.01 I don't understand why she did not contact the defendant before this. Again she

wasn't asked, and I therefore cannot speculate. She says that in January 2002 he said: "I no make money, I no pay any more." On her evidence this was the first she knew of the assertion that the defendant wasn't making money from her trees. She reminded the defendant that they had an agreement and he had to stick to it. She went on to suggest to him that if he wanted out he would have to find someone else to take over the agreement. She says that he said he'd try.

119. The plaintiff went on to say that sometime later in January of 2002 the defendant attended her house and said he could not continue with the agreement. The plaintiff says that she asked if he had found anyone else to take over and he said no. She said that she would have to sue him. He replied that she couldn't sue him as she was a woman and had no money. The defendant does not agree with this version.

120. The defendant says the plaintiff called him to remind him that the time for the next payment was coming. He says that he told her he had already told her he didn't want to do it any more. She again referred to the agreement, and he said he already told her twice. She told him that she would take him to Court and he said he didn't care.

121. The defendant has paid no money to the plaintiff after his last payment of $25,000 made in September 2001. In particular he has not paid the amount of $10,000 that was due on 30 January 2002. He is therefore in breach of the lease as alleged in paragraph 5(a) of the Particulars of Claim.

122. On the evidence I find that the first time the defendant indicated to the plaintiff that he wanted out of the agreement was in about October 2001 when he attended to pay the money that he owed. I also find from the evidence that the plaintiff never agreed to allow the defendant out of the agreement. On the contrary, she made it clear that if he wanted out he would have to find someone to take over his obligations under the agreement. She further made it clear that if he didn't continue with the contract she would sue him. It is therefore clear that the plaintiff was insisting that the

defendant comply with his obligations under the agreement. I reject the assertion in paragraph 4(d) of the Defence that "the entire contract been (sic. between) him and the plaintiff was discharged by mutual consent". I find that the agreement continued in full force and effect after this discussion in early October 2001.

123. The defendant picked the mangoes off of the plaintiff's trees in the 2001 year. Apparently this time they were sent to Sydney for sale. Lieu produced two payment advices from Sunfresh dated 26.10.01 and 30.10.01 (ExD6), and said that these were for all the mangoes from the plaintiff's farm in 2001. Again no basis was established for this assertion. No evidence to explain the document was given. The documents refer to "3086 Mangoes" and "1024 Mangoes" respectively, but does not specify if this is trays, boxes or what. The payment advice dated 26.10.00 stated as follows:

512 Red Dragon (Yellow Box):

12	10	@	14.00 =	168.00
34	12	@	15.75 =	535.50
35	14	@	15.75 =	551.25
90	16	@	17.50 =	1575.00
137	18	@	17.50 =	2397.50
153	20	@	15.75 =	2409.75
51	22	@	14.00 =	714.00
				8351.00

1816 Red Box (Not Marked):

93	10	@	10.50 =	976.50
216	12	@	10.50 =	2268.00
249	14	@	10.50 =	2614.50
259	16	@	10.50 =	2719.50
267	18	@	10.50 =	2803.50

331	20	@	10.50 =	3475.50	
145	22	@	10.50 =	1522.50	
128	No1	@	8.75 =	1120.00	
128	unmarked	@	8.75 =	1120.00	
					18620.00

758 No2:

758		@	10.50 =	7959.00	
					7959.00
				TOTAL	**34930.00**

And the payment advice dated 30.10.00 stated as follows:

1024		@	13.13 =	13,445.12	
				TOTAL	**13,445.12**

124. The figures appearing in the second column (10, 12, 14 etc) are unexplained and I do not know what this refers to. It may refer to some quality grading, but it may not. I must ignore those figures. If the figures of 3086 and 1024 refer to the number of trays taken from the plaintiff's trees then there is no evidence as to why there were so few (this totals 4110), bearing in mind that in 2000 there were allegedly 7215 trays (ExD3) or 8031 trays (ExD4 and ExD5). The defendant did not suggest in his evidence that there was a very reduced volume of fruit in 2001 as compared with 2000. Absent this evidence I am not satisfied on the balance of probabilities that ExD6 truly represents the full extent of the fruit from the plaintiff's property sent for sale in 2001.

125. In addition, Lieu again produced a bundle of tax invoices (ExD8) which appeared to have been freshly printed off on the letterhead of "VN Farm NT Mango & Mudcrab" and indicating "Bill to: VN Farm". These internal invoices to themselves stated as follows:

Date	7kg Trays	Price/Tray	GST	TOTAL
16.10.01	170	2.70	45.90	504.90
17.10.01	190	2.70	51.30	564.30
18.10.01	420	2.70	113.40	1247.40
19.10.01	670	2.70	180.90	1989.00
20.10.01	819	2.70	221.13	2432.43
21.10.01	680	2.70	183.60	2019.60
22.10.01	137	2.70	36.99	406.89
23.10.01	758	2.70	204.66	2251.26
24.10.01	462	2.70	124.74	1372.14
25.10.01	224	2.70	60.48	665.28
25.10.01	596	2.70	160.92	1770.12
27.10.01	395	2.70	106.65	1173.15
28.10.01	369	2.70	99.63	1095.93
29.10.01	389	2.70	105.03	1155.33
30.10.01	405	2.70	109.35	1202.85
TOTALS	**6684**			**19,850.58**

126. In relation to ExD8 Lieu said that these were the tax invoices for transportation. She was asked if any of these did not relate to the plaintiff and she answered, no. In addition, Lieu produced a further tax invoice (ExD7) which again appeared to be recently printed off. Again this was

printed on "VN Farm NT Mango & Mudcrab" letterhead and was "Bill to: VN Farm". This internal invoice stated as follows:

Date	**7kg Trays**	**Price/Tray**	**GST**	**TOTAL**
30.10.01	4,110	5.20	2137.20	23,509.20

127. In relation to ExD7 Lieu said that this related to picking and packing. She was asked if this related to any farm other than the plaintiff's farm and she answered, no.

128. There are obvious inconsistencies between these three exhibits, namely:

- ExD6 and ExD7 relate to 4110 trays, whereas ExD8 refers to 6684 trays, and no explanation is offered for this large difference;
- If ExD8 does relate to transport, why does it on it's face purport to relate to "packing";
- If ExD8 does relate to transport, why does the entry next to "freight" say "$0.00".

129. I do not accept on the balance of probabilities that ExD6 does include all the mangoes from the plaintiff's property. Further, I do not accept on the balance of probabilities that ExD8 truly reflects the actual cost of transporting (or packing) the plaintiff's mangoes. Nor do I accept on the balance of probabilities that ExD7 truly reflects the actual cost of picking and packing the plaintiff's mangoes. ExD7 and ExD8 are clearly documents that have been internally created. They are both self-serving documents. There was no evidence (apart from the bald assurances of the defendant and Lieu) that would enable me to be satisfied that they were genuine. No wages or employee records were produced. I do not know how many people worked on picking the plaintiff's fruit in the year 2001, over how many hours, and at what hourly or other rate. I do not know what the cost of a carton or box

was. I know nothing of the cost of getting the mangoes from the plaintiff's property to where they were packed. I do not know where they were packed. I know nothing of the real cost of transport when the defendant used his own vehicles (including hire, fuel, driver's wages or other expenses). I will not speculate on whether the defendant's documents may be some taxation sham (as I was invited to do by Mr O'Loughlin) as this would be a serious finding, and one which should not be made on the evidence before me. It would be a matter for the Commissioner of Taxation to decide whether to investigate the defendant's taxation affairs further, and I will say nothing more on that topic.

130. According to the defendant's income tax return for the year ended 30 June 2002 (ExD9) his gross income was $3,060,459 and his profit was $99,686. On the evidence before me the defendant has not satisfied me that he lost any money from the plaintiff's blocks in either 2000 or 2001.

131. It is clear that after removing the fruit from the plaintiff's trees in October 2001 the defendant has done nothing further in relation to his obligations under the agreement. In particular, the defendant has refused and failed to pay the $10,000 rent which was due on 30 January 2002. He has paid no further amounts under the lease and clearly has no intention of doing so. It is further clear on the evidence that the defendant had no intention of doing anything further under the agreement, and conveyed that in unambiguous terms to the plaintiff. He therefore clearly evinced an intention to no longer be bound by the agreement and repudiated it.

132. In a letter dated 7 May 2002 from the plaintiff's solicitors to the defendant (ExP10) it is stated (in part):

> "Your conduct in relation to your obligations show an intention to repudiate the terms of the lease; that is, showing that you do not intend to be any longer bound by the terms of the lease. Our client accepts your repudiation of the lease. The lease therefore is now at an end."

I find that this is a fair representation of the situation that had developed and the plaintiff accepted the defendant's repudiation, as I find she was entitled to do. I further find that there was never any agreement to mutually discharge the lease agreement and release each other from it's rights and obligations.

133. In relation to this letter I find the defendant's Defence inconsistent. In paragraph 6 he says "the defendant does not admit that a letter was sent to him by Cridlands as alleged or at all". Yet in paragraph 12 of the same Defence he says "the defendant admits that at some date he received a letter bearing date 7 May 2002 from Cridlands".

134. I find for the plaintiff on her claim against the defendant for repudiating and breaching the lease agreement. The question of damages remains to be decided (along with the issue of conversion and the defendant's counter claim which I will turn to later in these reasons).

135. The application of the contractual doctrine of repudiation to leases brings with it the right to damages in accordance with ordinary contractual principles. Thus the lessor may sue the lessee "for damages for loss of benefit of the tenant's covenant to pay future rent and outgoings": *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 157 CLR 17 at 55.

136. After repudiating the lease all that the defendant did was to try and find someone to take over the property. On the evidence of the plaintiff and the defendant I find that it was not reasonably possible to find any person who was willing to take over the agreement (ExP8). In fact neither of them were able to find anyone who was interested in the property on a commercial basis. However, it does not appear from the evidence that the defendant made a great effort, and the plaintiff appears to have made no better effort.

137. At some time (I'm not told when) the plaintiff spoke to Tim Broadbent whom she knew. He gave his occupation as a contract diesel mechanic. He

had attended Urrbrae Agricultural College and grew up on a farm. He had been to the property in about 1997, and said it was very tidy then. He next saw it in February/March of 2002. He observed the property was very overgrown (you couldn't even see the shed). The trees looked healthy but they needed pruning, on top, sides and the bottoms needed to be raised. He said that you are supposed to open up the middle to let the light in. The 550 trees in the relevant plantation were 30 to 40 feet high. He agreed that it would have taken more than a couple of years to get to that state.

138. On the property there were two groups of trees, each with about 500 trees. The group with the larger trees (being the trees the subject of ExP8) he said were well beyond it. He said that the taller trees would need to have been cut down to about 6 to 8 feet, basically leaving the trunk. Then they would take 3 to 5 years before they got any fruit back.

139. He noticed the ring barking with string. He said that he understood this to be a risky way to get a quick crop, which could cause a lot of damage to the tree.

140. On 10 May 2002 the plaintiff signed a letter marked "TO WHOM IT MAY CONCERN". This was in the following terms:

> "This letter permits Tim Broadbent to maintain the property (lots 45 & 46 Miles Road at Eva Valley, Batchelor) which includes firebreaks, slashing, pruning (mango trees), weed control, white ants control, and generally maintain the property to an acceptable standard. Mr Broadbent will accept the crop of mangoes as payment."

ExP7 was shown to Broadbent during his evidence. He confirmed that he had seen it before and reflected the arrangement he had with the plaintiff.

141. Broadbent said the property had Gamba(sic) grass on it that was in excess of 10 feet high and very thick. He used his slasher, and even in 1st and 2nd gear he was almost stalling. He pruned down the fence line on the northern side. He was advised not to prune too hard as it was too late to prune at the time and he might lose the fruit.

142. In the 2002 year Broadbent made numerous calls to find people to pick the mangoes that were on the trees. He rang numbers he obtained from the NT News. He took 3 lots of people out and they all rejected the crop saying it was too hard to pick. He was told that it was too hard to get pickers between the trees and a cherry picker would cost too much. He estimated that he made 30, 40, 50 calls. He said he was on the phone all the time. He said it was very hard to get pickers due to the Ansett crash and the Bali bombing.

143. The defendant in his evidence denied that it was hard to get pickers in the 2002 year. Yet there is no evidence that the defendant offered any help to the plaintiff in this regard. He appears to have simply walked away from the agreement and washed his hands of the property. I accept the evidence of Broadbent that he made real efforts to obtain pickers and was unable to do so.

144. Broadbent said that he subsequently found that the fruit had been stolen and removed from the trees by persons unknown. Hence someone was able to pick the crop.

145. Broadbent tried to get a quote for pruning but couldn't. He estimated that it would take him 3 weeks full-time with a chain saw to prune and clear the branches. As the crop had been stolen he was unable to get any income from the fruit. Hence in February/March 2003 he told the plaintiff that he couldn't handle the property as he had been relying on money from the crop to pay for pruning and other necessary work. It appears that nothing has happened in relation to the plaintiff's property since.

146. Mr Cantrill has submitted that the plaintiff is under a duty to mitigate her loss, and that she has failed to do so. In relation to the extent of the duty to mitigate Yeldham J said in *Sacher Investments Pty Ltd v Forma Stereo Consultants Pty Ltd* (1976) 1 NSWLR 5 at 9:

> "Although a plaintiff cannot recover for loss consequent upon a defendant's breach of contract, where he could have avoided such loss by taking reasonable steps, nonetheless a defendant who seeks to

> rely upon a failure to mitigate must show that the plaintiff ought, as a reasonable man, to have taken steps for the purpose of doing so. The plaintiff is not under any obligation to do anything other than in the ordinary course of business, and the standard is not a high one, since the defendant is a wrongdoer. See generally *Chitty on Contracts*, 23rd ed, vol 1, par 1482 et seq, 691 et seq. See also *Banco de Portugal v Waterlow & Sons Ltd* (1932) AC 452, at 506:
>
> "The law is satisfied if the party placed in a difficult situation by reason of the breach of duty to him has acted reasonably in the adoption of remedial measures, and he will not be held disentitled to recover the cost of such measures merely because the party in breach can suggest that other measures less burdensome to him might have been taken."

147. The onus is on the defendant to establish that the plaintiff has failed in it's duty to mitigate damages: *Commercial Tenancy Law in Australia* (supra) at 16.30; *Jones v Edwards* (1994) 3 TasR 350 at 359. I find that the defendant has failed in this onus. No evidence was led from which I could find that there were other things that the plaintiff should reasonably have done which she did not do. Nor is there any evidence from which I could be satisfied that the plaintiff might have received some income from the property if she had taken some (unspecified) step. The defendant was in the business of mango harvesting and sale. He had contacts within that industry. It also appears that other persons of Vietnamese background were also in that same industry. Therefore the defendant was in a better position than the plaintiff to get someone to take over his obligations under his lease (whether for the same, or a different rental) but he was unable to. It was not surprising therefore that the plaintiff was also unsuccessful.

148. I find that by early 2002 the 550 Kensington Pride trees had been allowed to progress (by no or ineffective pruning over a number of years, probably at least four years) to a state whereby they were of reduced commercial value. Their size had become such that they were difficult to pick and the quality of the fruit was compromised. The defendant had himself substantially contributed to this state of affairs, but I am unable to find that he was solely responsible. In failing to adequately prune the trees when he started to lease

the property in late 1999, and again in late 2000 after he had picked the fruit, and again in late 2001 when he had picked the fruit he was in breach of his obligations under the lease.

149. At the time the defendant repudiated the lease he had, I find, left the property, and trees in particular, in a condition whereby they had little commercial appeal. I find that what was probably required was for the 550 Kensington Pride trees to be drastically pruned back. Having done that they might then not have produced much fruit for a year or two, and it may have taken two or more years before they would produce a commercial yield. I have no evidence from which I could find how much this drastic pruning would have cost. But, it was unlikely to be a cheap or easy job. Plus there was the probable non-financial return for some years. I find that it was highly unlikely that anyone would have been interested in leasing the blocks, or paying for the mangoes on the trees.

150. In their book *Commercial Tenancy Law in Australia (2nd edition)* the learned authors A J Bradbrook and C E Croft say at paragraph 11.17:

> "Situations arise where the lessee relinquishes possession of the demised premises prior to the expiration of the lease and the question then arises, what rights, if any, does the lessor have to claim rent or damages with respect to the balance of the term? The answer to this question will depend principally on what the lessor does with the premises after they have been so abandoned.....The lessor can choose not to re-let the premises, in which case the lessee remains liable for the rent and the lessor is under no duty to mitigate his or her loss by re-letting: *Hughes v NLS Pty Ltd* (1966) WAR 100; 120 CLR 583... *Maridakis v Kouvaris* (1975) ALR 197.....The lessor who adopts such a course is entitled to change the locks in order to protect the property: *Relvok Properties v Dixon* (1973) 25 P&CR 1. If, however, the lessor accepts the abandonment of the premises by the lessee and re-lets them, then such an act on his or her part will probably put an end to the original letting. In such circumstances there is a surrender by operation of law.....If the new letting is at a rent which is less than the amount which the former lessee had to pay, then the question arises whether the lessor can claim such loss by way of damages or in an action for arrears of rent from the original lessee. "

151. In the instant case the plaintiff has not chosen to do nothing in relation to the property. She entered into an agreement with Broadbent as evidenced by ExP7 dated 10 May 2002. I find that this was the best she could do in the circumstances. Did this amount to a re-letting?

> "As in the case of other binding agreements, the basic terms of a lease must be agreed upon before the lease is capable of being enforced by any party to it. For example, the duration of the term, it's date of commencement, the parties to it, and the subject matter of the demise must be agreed upon and must be capable of being ascertained with certainty." (Para 1.5 *Commercial Tenancy in Australia*)

ExP7, in my view, is not capable of creating a lease as the duration of the term is not capable of being ascertained with any certainty. It therefore follows that the plaintiff has not re-let the property to Broadbent. The effect of ExP7 was that Broadbent was to maintain the property for the plaintiff and in return he could harvest any mangoes thereon. Clearly, Broadbent didn't end up getting any mangoes and is unwilling (and probably unable) to continue with maintaining the plaintiff's property. That is reasonable in the circumstances.

152. In his written submissions (second last paragraph of page 12) Mr Cantrill appears to be suggesting some male fides in the arrangement between the plaintiff and Broadbent. None has been proved on the evidence. I find Broadbent to be a witness of truth, and accept his evidence. Nor do I find anything sinister or untoward on the part of the plaintiff in her making the arrangement with Broadbent that she did.

153. The plaintiff is seeking the full amount of the rent outstanding for the whole unexpired period of the lease, namely $75,000. If the lease had been ongoing then the plaintiff would not have been entitled to this money now. She would have been entitled to:

- $10,000 on 30.1.02
- $15,000 on 15.9.02

- $10,000 on 30.1.03
- $15,000 on 15.9.03
- $10,000 on 30.1.04, and
- $15,000 on 15.9.04.

It follows from the application of the ordinary rule that damages are to be discounted to take account of the immediate payment of future economic loss: *Hughes v NLS Pty Ltd* (1966) WAR 100; *NLS Pty Ltd v Hughes* (1966) 120 CLR 583. At the time of trial $50,000 had already fallen due, and the plaintiff would ordinarily (but I note no interest is claimed in the plaintiff's Particulars of Claim) be entitled to interest under the Local Court Act on some of this money. A further $10,000 would have been due shortly before the date this judgment was delivered. Accordingly, we are only talking about the early payment of $15,000.

154. On the evidence before me there may be difficulties in enforcing judgment. In those circumstances it would appear fair if the plaintiff were to obtain a judgment against the defendant in the sum of the full amount of $75,000, but with no interest included. However, I will not make any formal orders until I have heard from counsel on the form of the final orders and on costs.

155. If I am wrong in my conclusion that ExP8 does constitute a lease, then in my view, the same result would have followed from the facts in this case. If the agreement was a contract (mango agreement) rather than a lease, then I would have found the defendant in breach of the same terms as I have found earlier in this judgment. I would have made the same findings as I have on the issues of unconscionable conduct, mistake etc. I would not have varied the contract in favour of the defendant, nor would I have declined to have enforced it. I would still have found that the defendant had repudiated the agreement, and the plaintiff accepted the repudiation as she was entitled to

do. The assessment of damages would have still arrived at the same result. In short, I would have arrived at the same result.

156. If the plaintiff had herself undertaken to have the Kensington Pride trees drastically pruned after the defendant repudiated ExP8, then in my view, this would not have mitigated her loss during the period covered by ExP8. Rather, she would have gone to an expense which would have been unlikely to have resulted in any mitigation (earning any income from the trees) until after ExP8 expired. I note that the term of ExP8 was until 30 November 2004. She might have been able to sell the mangoes for the 2004 season, but I have no evidence from which I could find what the likely yield or return might have been. Nor do I know what costs (of pruning etc) would need to have been deducted. It is therefore impossible for me to find that the plaintiff has failed to mitigate her loss.

157. I turn now to consider the plaintiff's claim based on conversion.

158. Listed in the schedule of goods and chattels forming part of ExP8 was "1 x John Berends six foot offset slasher". The plaintiff stated that she owned the slasher. She had paid $4,200 to purchase it in about 1996. She went on to say that the slasher was at the Wilson's property (Lot 43) and she didn't see it given to the defendant. She hadn't seen the slasher since she entered into ExP8.

159. The defendant said that he picked up the slasher from another farm about two months after the agreement, and took it back to the plaintiff's property. He put a new blade on it. He used it on the plaintiff's property. When he decided to have no more of the agreement he took the slasher to his property (because his property is locked). He was asked in examination in chief whether the plaintiff ever said that he could take the slasher away from her farm, and he answered no. His reason was that he was worried somebody could take it as the property wasn't locked. It is unclear on the evidence as to when the defendant removed the slasher, but I find that it was probably in

about October 2001. He said that the plaintiff told him to bring the slasher to her house. He refused.

160. The defendant said that the slasher was at his property in May 2002 when he received a letter from Cridlands (ExP10). There was no evidence to suggest that the defendant had removed the slasher with the knowledge or agreement of the plaintiff. The said letter stated (amongst other things):

> "You are required to return the slasher to our client at the Myles Road property within 48 hours of the date of this letter. In the event of your failure to do so we have instructions to apply to the court for an order requiring you to do so without further notice to you."

161. This demand was very clear and reasonable in the circumstances. It was ignored by the defendant. As noted earlier the plaintiff is claiming damages for conversion of the slasher. Despite the plaintiff's written demand and these proceedings the defendant has made no attempt to return the slasher to the plaintiff's property, being the place from which he removed it without permission. In the defendant's defence he denied the plaintiff's claim in conversion. He did not offer to return the slasher. He did not disclose exactly where the slasher might be in his pleading. In paragraph 9 of he Defence he said: "After renovation and repair he used it on the Property and has retained it at his premises for safe-keeping, as the Property is unoccupied and has no lock-up facilities to secure it. The plaintiff has been well aware since discharge of the contract that she could at any reasonable time arrange to collect the slasher from the defendant." There was no evidence that the plaintiff was "well aware" as alleged or at all.

162. I have not been made aware of any correspondence or conversations between the parties or their solicitors in an attempt to resolve the impasse. I would hope that there were efforts in this regard.

163. When asked where the slasher was at the time he was giving his evidence the defendant initially said that he did not know. A photocopy of an invoice dated 19.6.03 from "Farm Fix" was then shown to the defendant. He said

that the slasher had been put there for servicing. He said that he had paid the invoice amount of $282.59, and the slasher was still there and could be collected from there. It became an agreed fact that the slasher was serviced on 19.6.03 and was now available for collection at Farm Fix. It was never agreed or accepted by the plaintiff that it was her obligation to collect it. Neither the defendant nor his counsel seemed to accept that the defendant had any obligation to return the slasher that he removed.

164. In removing the slasher without the knowledge or agreement of the plaintiff the defendant has dealt with the slasher in a manner inconsistent with the rights of the plaintiff. In retaining it and refusing or failing to return it to where he removed it from he has, in my view, asserted a right inconsistent with the plaintiff's rights. The defendant has deprived the plaintiff of any opportunity to use the slasher, whilst retaining his opportunity (whether he utilised it or not) to use it, when he had no right to do so.

165. I therefore find that the defendant did convert the slasher to his own use (from October 2001).

166. Mr O'Loughlin submits that the defendant has no right to require the plaintiff to have to take positive steps to recover her property which was removed wrongly. It follows that he submits that it is for the defendant (at his expense) to return the slasher. In *Dodd Properties (Kent) Ltd v Canterbury City Council* (1980) 1 All ER 928 Megaw LJ said:

> "A plaintiff who is under a duty to mitigate is not obliged, in order to reduce the damages, to do that which he cannot afford to do, particularly where, as here, the plaintiff's financial stringency, so far as it was relevant at all, arose, as a matter of common sense, if not as a matter of law, solely as a consequence of the defendant's wrong doing."

This does not apply in the instant case, as there is no evidence of impecuniosity as a reason for the plaintiff not collecting the slasher. Why then does the plaintiff not have a duty to mitigate her loss? Mr O'Loughlin asserts in his written submissions (paragraph 50) that "the plaintiff is not

obliged to collect the property" but he cites no authority to support this. In *Volume 19* of *Halsbury's Laws of Australia* in *paragraph 315-545* it is stated that:

> "At common law, if goods are wrongfully removed, or wrongfully in the possession of another, the owner may lawfully retake them and use whatever force is reasonably necessary to gain control of them.....The use of force must follow a demand to yield up possession peacefully."

167. Accordingly, the plaintiff has a legal right to re-take possession of her slasher. If she should incur any cost in doing so then this is something that she could have sought to recover from the defendant in this action.

168. In the instant case, it appears that the slasher came into the possession of Farm Fix through the defendant. There is no evidence (or agreed fact) as to whether Farm Fix has been asked to allow anyone to collect it. I do not know whether Farm Fix are claiming to be owed any money (for storage or otherwise) in relation to the slasher. If this were in fact the case then I would have expected to be informed of this. I have no evidence to suggest other than that the slasher may be available for immediate collection.

169. No evidence was led to suggest that it may be unreasonable or impractical for the plaintiff to collect the slasher. It appears rather that the plaintiff is unwilling to do so. Likewise, no evidence was led to suggest that it may be unreasonable or impractical for the defendant to collect the slasher and return it to the plaintiff's block. The plaintiff does not live on the relevant blocks, and rarely visits them. Therefore, if the defendant were to simply return it there, there may be a dispute if it subsequently went missing. It appears (in the absence of any evidence of any reason) that the parties have both dug their heels in, and neither is willing to take a step to return the slasher.

170. I am not aware of any authority to support Mr O'loughlin's contention that the plaintiff is allowed to do nothing to reclaim the slasher. Nor am I aware of any authority that requires the defendant to physically return the slasher

into the possession of the plaintiff. It may well be that saying "here it is you can have it" is enough. In the absence of any authority that suggests that either party has a legal obligation, I consider that I should decide the matter based on the evidence in this case and on what is reasonable. The defendant removed the slasher because (so he says) the property was unsecured. Bearing in mind that I have found that the lease still remained on foot then the defendant did still have obligations, including an obligation in relation to the slasher. However, at the same time he had clearly repudiated the lease and was intending to not honour it further. In that light his actions in removing the slasher without the knowledge or consent of the plaintiff were, in my view, not reasonable.

171. The defendant appears to have spent money in having the slasher repaired/serviced by Farm Fix.

172. How to resolve the impasse. There is no evidence to suggest that Farm Fix has it's premises in an area that is inconvenient for one or other of the parties. There is no evidence to suggest that it is more or less convenient for one party to collect the slasher. In those circumstances I find that the defendant in having the slasher repaired/serviced at his expense, and having the slasher available for collection by the defendant has done sufficient. If I were to order the defendant to return the slasher at his expense, then further litigation might arise from such an order.

173. In the case of *Milk Bottles Recovery Ltd v Camillo* (1948) VLR 344, Lowe J held that:

> "Where chattels have been placed in the hands of a bailee for a limited purpose and he deals with them in a manner wholly inconsistent with the terms of the bailment, and consistent only with his intention to treat them as his own, the right to possession revests in the owner, who can sue in trover the bailee or other person in possession of the chattels."

174. Without the use of the slasher the plaintiff has been unable to have the opportunity to use it, or to allow anyone else to use it. She has been denied

the opportunity to hire it out or sell it if she had wanted to. In short she has been denied the opportunity to deal with her own property. I therefore find that the plaintiff is entitled to damages for conversion from October 2001 until 23 September 2003. This was the date that the invoice from Farm Fix (ExD1) was tendered in court, and also the date that I noted the following agreed fact:

> "the slasher was serviced on 19.6.03 and is now available for collection at Farm Fix."

175. On the evidence I find that it was not until 23 September 2003 that the plaintiff was informed by the defendant where the slasher was actually located, and where she might collect it from. If she had acted on the earlier advice and attended at the defendant's property to collect the slasher it would not have been there.

176. The plaintiff is seeking the full amount of what the slasher was purchased for in about 1996, namely $4,200. There was no evidence as to what the current price of a similar new slasher would be. Nor do I know what the slasher was worth at the time the agreement commenced, nor what it was worth on 23 September 2003.

177. The principles of compensation in conversion are the same as they are in negligence and nuisance (*Egan v State Transport Authority* (1982) 31SASR 481 at 523; *Butler v Egg and Egg Pulp Marketing Board* (1966) 114CLR 185). There was no evidence from the plaintiff of any loss that she actually suffered as a result of being without the slasher for this (approximately two year) period. It was not suggested that she would have hired it out. It was not suggested that she had to buy or hire another one. Broadbent used a slasher on the block after the defendant repudiated the lease, but it was not suggested that this resulted in any actual financial cost to the plaintiff. There was no evidence of any actual financial loss to the plaintiff at all in respect to the slasher. Nor was there any evidence to suggest that the

condition of the slasher had deteriorated during the relevant period. There was no evidence of it's current condition at all.

178. There was no evidence led as to what the cost of hire of this particular slasher might have been. I consider that the defendant should pay some damages to the plaintiff for removing and keeping the slasher. The question is how should this be calculated. In the end I propose to award the plaintiff the difference in the likely depreciated value of the slasher during the two years that the defendant deprived her of it. I assume that the slasher would depreciate in value at the rate of about 10% per annum. It was purchased in 1996 for $4,200. I therefore assume that it would have been worth about $3780 in 1997; $3401 in 1998; $3062 in 1999; $2756 in 2000; $2481 in 2001; $2233 in 2002; and $2010 in 2003.

179. Accordingly, it is likely to have depreciated by $248 between 2001 and 2002, and $223 between 2002 and 2003. This makes a total of $571. During this period the defendant has paid $282.59 for repairs (ExD1). On the face of this exhibit the repairs involved bearings, seals and gearbox oil. No consumables (such as blades) were involved. I therefore do not reduce the plaintiff's entitlement in this regard.

180. On the claim for conversion I find for the plaintiff and award $571 against the defendant.

181. I now turn to consider the Counterclaim in this matter. As noted earlier I have found that the lease was not unconscionable, and have therefore rejected the defendant's call to have it set aside. This effectively deals with paragraphs 17 and 18 of the Counterclaim.

182. I do not find that "At all relevant times the plaintiff was a supplier and the defendant was a customer within the meaning of the unwritten Laws of Australia" as pleaded in paragraph 16 of the defendant's Particulars of Claim (sic Counterclaim).

183. In paragraph 19 of the Counterclaim the defendant alleges that he:

> "has expended by himself and with the assistance of his family a further amount of time, labour, and effort over a period of two years in attempting to maintain, keep clean, improve and repair the plaintiffs orchard and machinery whereby the plaintiff has been unjustly enriched, and the defendant says that the value of such work exceeds the sum of $50,000.00 but that he is prepared in the circumstances to waive any amount by which this counterclaim would otherwise exceed the jurisdictional limit of this Honourable Court."

184. I find that the defendant did little if anything to maintain and keep clean the plaintiff's orchard. Further, I find that he did not maintain or repair the trees of the orchard. On the contrary, I find that the trees were damaged intentionally by the defendant in ring-barking some of them. Further, I find that the trees deteriorated during the term of the lease because the defendant did not properly or adequately prune and maintain the trees.

185. The plaintiff has not been enriched by any actions of the defendant, his family or employees during the period of the lease. The only "enrichment" that the plaintiff received was the payment of some of the rent that was owed under the lease. I find there was nothing unjust in that, and I have already found that the defendant owes the balance of the rent.

186. I find that the Counterclaim is without merit and I dismiss it.

187. Before leaving the Counterclaim I note paragraph 25(b) of the plaintiff's Defence to Counterclaim, where it is alleged that the defendant "sublet the property and orchard to other persons without the prior approval and consent of the Plaintiff". I find that there is no evidence to support this allegation, and I reject it.

188. In summary, I find that the plaintiff is entitled to a judgment for $75,000 for breach of the lease, plus $571 for conversion of the slasher. I will hear the parties on the formal terms of the final order, plus costs and any outstanding issues.

Dated this 4th day of February 2004.

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D TRIGG
STIPENDIARY MAGISTRATE